THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS

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PERFORMANCE TESTS AND SELECTED ANSWERS
FEBRUARY 2001 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2001 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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TUESDAY AFTERNOON
FEBRUARY 27, 2001

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

SIERRA CORPORATION

SIERRA CORPORATION

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal principles in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States, which is located in the 15th Federal Judicial Circuit. Your firm represents the Sierra Corporation in a labor relations matter.

3. You will have two sets of materials with which to work: a File and a Library. You will be called upon to distinguish relevant from irrelevant facts, analyze the legal authorities provided, and prepare an opinion letter.

4. The File contains factual information about your case in the form of five documents. The first document is a memorandum to you from Igor Moon, senior partner in your firm, containing the instructions for the letter you are to prepare.

5. The Libra materials may be real, modified, or written solely for the purposes of this examination. Although the materials may appear familiar to you, do not assume that they are precisely the same as those you might have read before. Read them thoroughly as if all were new to you. You should assume the cases were decided in the jurisdictions and on the dates shown in the text.

6. Your letter must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

7. In citing cases from the Libra , you may use abbreviations and omit volume and page citations.

(Continued on Next Page)

8. Although there are no restrictions on how you apportion your time, you should probably devote at least half of your time to reading and organizing and the remaining half to writing.

9. This part of the examination will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of the letter you prepare.

DEWEY, GONZALES & HOWE
Attorneys and Counselors at Law
1811 Tower Avenue, Suite 1200
Los Diablos, Columbia

MEMORANDUM

Date: February 27, 2001
To: Applicant
From: Igor Moon
Re: Sierra Corporation

We have been asked by Claude Barrow, Chief Executive Officer of the Sierra Corporation, to advise him regarding a union organizing effort at the company. Sierra sells, installs and services heating and cooling equipment for commercial builders throughout this part of the United States. All 146 technicians employed by Sierra have been represented for the past twelve years under a collective bargaining agreement with Local 841, International Union of Sheetmetal Workers. Recently, however, Local 841 began a campaign to organize Sierra's fifteen clerical workers who have never been represented by a union.

Union President J. L. Lewis has requested in writing that Barrow voluntarily agree to recognize Local 841 as the bargaining representative of the clerical workers. He claims that the majority of the fifteen have signed authorization cards designating Local 841 as their bargaining representative. Lani Carovick, Vice President in charge of personnel, has spoken to each of the clerical workers individually and has told Mr. Barrow that the workers generally favor being represented by the Union. However, Mr. Barrow is still not convinced that the union would ultimately win an election, especially if certain key clerical employees were entitled to vote. The problem is that he wants those key employees excluded from any bargaining unit that the Union might end up representing. The Union, so far, has said it will insist on representing all the clerical employees.

The key employees are Dorothy Street, Mr. Barrow's secretary; David Drake, Ms. Carovick's secretary; and Patricia Norris, secretary to the head of the Purchasing Department.

I've made an appointment to discuss the matter with Mr. Barrow tomorrow at 4:00 p.m. We are to deliver to him by close of business today a pre-counseling letter that he can review in preparation for our meeting. Please draft a pre-counseling letter to Mr. Barrow in which you:

(1) State your understanding of Mr. Barrow's goals;
(2) Explain the substantive criteria the National Labor Relations Board applies in determining whether to exclude as "confidential" employees from a bargaining unit sought to be represented by a union;
(3) In light of those criteria, evaluate the likelihood that Street, Drake and Norris would be excluded as "confidential" employees; and
(4) Explain the courses of action available to Sierra in response to the Union's request for voluntary recognition, and also in the event the Union files a petition for a representation election and refuses to stipulate to the exclusion of the three key employees, Ms. Street, Mr. Drake and Ms. Norris. For each course of action, make sure to discuss the possible consequences for Sierra, whether legal, economic or personal.

Although Mr. Barrow is a sophisticated businessman, he is not a lawyer. Thus, be sure to write the pre-counseling letter and explain your reasoning in language that can be understood by a layperson.

INTERNATIONAL UNION OF
SHEETMETAL WORKERS
LOCAL 841
P.O. Box 7781
Los Diablos, Columbia

February 26, 2001

Claude Barrow
Chief Executive Officer
Sierra Corporation
2829 Industrial Parkway
P.O. Box 372 A
Wagner, Columbia

Dear Mr. Barrow:

As you are aware, this union has been actively engaged recently in organizing the clerical workers of your company with a view toward representing them for purposes of collective bargaining. Local 841 has secured authorization cards from ten of your fifteen clerical workers, indicating strong support for the union.

It is the union's intention to represent the following employees in a bargaining unit comprised of all clerical workers:

Name	Job Title
Ann Beaty	Clerk/Typist
Ike Bergman	Clerk/Typist
Clara Duran	Clerk/Typist
David Drake	Administrative Secretary
Anthony Fong	Clerk/Typist
Sally Frappe	Clerk/Typist
Terry Incaviglia	Clerk/Typist
Tran Phan Ngu	Bookkeeper
Patricia Norris	Administrative Secretary
Elisheva Rosen	Clerk Typist
Drusilla Rush	Clerk/Typist
Dorothy Street	Executive Secretary
Barbara Strunk	Clerk/Typist
Marge Wojtowicz	Clerk/Typist
Pamela Wolper	Clerk/Typist

If the union petitions the National Labor Relations Board for a certification election, we are confident that Local 841 will gain recognition as the bargaining representative of the clerical workers. However, in view of the showing of support that we have gained, as evidenced by the authorization cards, we request that you voluntarily recognize the

union as their representative so that we might avoid the time-consuming NLRB election procedure and proceed directly to the bargaining table.

If you are amenable to this proposal, please contact me at your earliest convenience. If I do not have your affirmative response before March 3, 2001, I will file a petition with the NLRB for a certification election.

Very truly yours,

J. L. Lewis, President

DEWEY, GONZALES & HOWE

Attorneys and Counselors at Law
1811 Tower Avenue, Suite 1200
Los Diablos, Columbia

MEMORANDUM

Date: February 23, 2001
To: File
From: Igor Moon
Re: Telephone Call to Lani Carovick, V.P.

After reviewing the job descriptions and the letter sent over by Lani, I called her to see if either Ms. Street or Mr. Drake had any other involvement in labor relations, as opposed to routine personnel functions, and I asked some questions about Patricia Norris. Lani indicated the following:

David Drake
Mr. Drake has sat in on portions of collective bargaining sessions to take dictation and transcribe key provisions of collective bargaining agreements.

He has also maintained files on individual employee grievances, typed preliminary and final drafts of management responses to employee grievances, and transcribed portions of tape-recorded grievance procedures at the internal hearing stage. Drake has access to all of Lani's files but not to any of the files maintained by Dorothy Street.

Drake is essentially the primary clerical assistant to the management team that has responsibilities in the labor relations area. By virtue of his involvement in typing written memoranda for members of this team, he is privy to management decisions before they are made public.

Dorothy Street
Ms. Street was called into a collective bargaining session on one occasion when Mr. Drake was sick, but otherwise she has not been directly involved in labor relations matters.

Her exposure to confidential information comes primarily from receipt of the information that goes to all management and the Board. Technically, Street does not keep any personnel, grievance, labor or employee files denominated as such, although Lani acknowledged that Street, on behalf of Claude Barrow, has access to every file at Sierra.

Patricia Norris

Ms. Norris' responsibilities are not directly related to personnel matters, but she does have access to sensitive and confidential financial information affecting the fiscal condition of the company. Her supervisor, Paul Young, vice president in charge of Purchasing, is part of the management team that plans marketing and distribution strategies, determines whether and when to introduce new products and generally oversees the direction of the company. Norris attends management meetings at which such matters are discussed, but she is not part of the decision-making process.

SIERRA CORPORATION

2829 Industrial Parkway
P.O. Box 372 A
Wagner, Columbia

February 20, 2001

Igor Moon, Esq.
Dewey, Gonzales & Howe
Attorneys and Counselors at Law
1811 Tower Avenue, Suite 1200
Los Diablos, Columbia

Dear Mr. Moon:

Claude Barrow asked that I send you the main office clerical staff job descriptions and tell you what involvement our secretaries have with personnel matters.

Dorothy Street, Claude's secretary for the last two years, has been with Sierra for almost ten years. She started as a secretary-typist and worked up to her present position of Executive Secretary. Dorothy works directly with Claude and the Board of Directors. She does all Claude's correspondence, arranges meetings, trips, even telephone calls; she attends board meetings, executive committee meetings and most senior management meetings, and prepares, maintains and distributes minutes of these meetings.

In short, almost nothing happens at the highest level of the company which is not known to Dorothy. As a result, she knows about current and projected income and profits. All our major business decisions on product lines and pricing, customers, expansions, layoffs, budgets, financing and dividends are made at meetings she attends or are contained in memos she prepares or keeps.

Claude doesn't get involved in day-to-day labor relations and personnel matters, but he certainly has the final say as to things relating to Sierra's workforce.

My secretary, David Drake, works on and keeps records of almost all the company's personnel matters: job descriptions, job postings, listings of benefits, all employee personnel files, required reports not already done by the accounting department, all employee W-4s, personnel evaluations, government notices and information, etc.

Because I handle labor relations, including the biennial renegotiation of our collective bargaining agreement with Local 841, David maintains all our union files, such as grievances, union correspondence, and legal matters. Unlike Dorothy, David does not attend most senior management meetings.

Patricia Norris is administrative secretary to the head of the Purchasing Department. Although her job title is the same as that of my secretary, her day-to-day responsibilities differ somewhat. She is primarily responsible for maintaining the records of her department, including purchase requisitions and purchase orders for materials used in the manufacture of the company's products. The Purchasing Department also handles the purchase of office and shop supplies and equipment, and Patricia keeps all records associated with those matters. Because the Purchasing Department is also responsible for the maintenance of the company's physical plant, Patricia also keeps all records associated with those functions, including plant renovations and repairs, as necessary. In this capacity she assigns work on a daily basis to a clerk/typist within the Purchasing Department, and reports to the head of the Department regarding that individual's job performance. While Patricia's duties do not encompass labor relations as such, she does have access to certain financial records of the company, and attends meetings of company officials in which fiscal decisions, including decisions on the development of new products or the expansion or curtailment of existing products, are made.

Although we repose full trust and confidence in Dorothy, David and Patricia, we feel their inclusion in the bargaining unit would put all of us in untenable positions. We would be unable to assign work to them relating to personnel and labor-management matters and matters relating to plant maintenance. They would likely be under pressure from the union and the clerical unit to provide them with information helpful to the union's bargaining position.

Please call me if there is additional information I can provide.

Sincerely,

Lani Carovick

Lani Carovick
Vice-President

Enclosures

SIERRA CORPORATION
PERSONNEL DEPARTMENT
JOB DESCRIPTION: EXECUTIVE SECRETARY
(Revised August 15, 1996)

DEFINITION:

Under general direction, provides secretarial and office assistance to the Chief Executive Officer (CEO), is accountable for a broad range of duties and services inherent to the functions of the Executive Office, and maintains confidential relationships with the Executive Staff, Board of Directors, and the CEO.

MAJOR TASKS AND RESPONSIBILITIES:

1. Coordinates, prepares and completes complex, highly technical, and confidential clerical/secretarial support tasks that are unique to the office of the CEO.

2. Receives and personally handles to completion specific tasks as directed by the CEO, including dictation and transcribing, gathering information concerning staff activities, and coordinating meetings and appointments.

3. Originates and responds to routine correspondence and manages various support services related to the function of the Executive Office.

4. Acts as primary liaison for communication to and from the CEO with appropriate ate routing of correspondence.

SIERRA CORPORATION

PERSONNEL DEPARTMENT

JOB DESCRIPTION: ADMINISTRATIVE SECRETARY

(Revised November 1, 1993)

DEFINITION:

Under general direction, performs a wide variety of difficult clerical and secretarial work, relieves the head of a department, division or office of administrative details, and performs related work as required.

MAJOR TASKS AND RESPONSIBILITIES:

Individual incumbents may be assigned subsets of the following.

1. Performs secretarial and administrative work for the head of a department, receives and transcribes dictation of letters, reports, memoranda and other correspondence from the department, and prepares correspondence independently from notes, instruction or own initiative. May take notes and prepare minutes for a committee or other group. Reviews material for errors in grammar and English usage.

2. Serves as the contact person for a department head: receives callers, provides information, answers complaints or schedules appointments for a department head or proper staff member, and arranges meetings and conferences. May assign and review the work of other clerical positions.

3. Relieves a department head of administrative detail such as compiling statistical information, assists with the preparation of contracts and other legal documents, reviews applications and requests for action, and assists in various other management details, Compiles information and prepares statistical and narrative reports for the Board of Directors, corporate counsel and others.

TUESDAY AFTERNOON
FEBRUARY 27, 2001

California Bar Examination

Performance Test A

LIBRARY

SIERRA CORPORATION

LIBRARY

National Labor Relations Act

§2(3). The term "employee" shall include any employee,... but shall not include... any individual employed as a supervisor...

§2(11). The term "supervisor" shall include any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

§8(a)(3). It shall be an unfair labor practice for an employer to discriminate against any employee covered by this Act in regard to hire or tenure of employment or any term or condition of employment because of such employee's membership in or activities on behalf of any labor organization.

§8(a)(5). It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.

Excerpts from Murphy, The Law of Collective Bargaining (1986)

§3:28. Showing of Support.

If a union feels that its organizing activities within a workplace have been successful, that is, if it feels that a majority of the targeted employees supports the union, it will ordinarily ask them to sign "authorization cards." These cards, although they have no legally binding effect, state that the employee wishes the union to be his or her representative for the purpose of bargaining with the employer with respect to hours, wages and all other terms and conditions of employment. These cards serve to demonstrate to the National Labor Relations Board (Board) that there is sufficient support for the union within the workplace to warrant a representation election. The Board will ordinarily conduct such an election only when it has assurance (as provided by the authorization cards signed by at least 1/3 of the employees in the proposed bargaining unit) that there is a sufficient "showing of support" for the union among the workers. Unless such a showing exists, the Board will not schedule a representation election.

The authorization cards sometimes serve an additional purpose. If enough employees sign the cards so that a union victory seems virtually certain, the employer might voluntarily agree to recognize the union without an election. In fact, this is a common method for establishing a union as the bargaining representative of a group of employees. The mere fact that a majority of the employees has signed authorization cards does not necessarily insure that a majority will vote for the union.

§6:11. Methods for Gaining Recognition.

There are three methods by which a union might be certified as the bargaining representative of a group of employees:

1. Election. If the union is able to demonstrate to the Board that the requisite number of employees within the proposed bargaining unit supports the union, then it may petition the Board for a representation election. The showing of support is most commonly done by presenting to the Board a sufficient number of "authorization cards" (see §3:28) to justify the time and expense of an election. The Board generally requires a showing from at least one-third of the employees in the bargaining unit, but the union will ordinarily attempt to secure cards from at least a majority of the employees.

Following the receipt of the union's election petition and the showing of support, the Board schedules a secret ballot election, usually at the workplace during working hours. If the union gains a majority of the votes cast, the Board certifies it as the exclusive bargaining representative of the employees in the bargaining unit.

An election can be directed by the Board's Regional Director after a hearing (see infra). It can also be ordered as the result of a stipulation to a "consent election" between the parties. In the latter event, the parties can agree either that the determination of all issues by the local Regional Director will be final or that the parties reserve their right to petition the Board for a review of the election results.

2. Voluntary employer recognition. In many cases it is apparent that a majority of the employees wants the union to represent them, and the employer will decide not to put the matter to a vote. Although the employer is not required to do so, the employer might voluntarily agree to recognize the union as the collective bargaining representative and never involve the Board.

3. Unfair Labor Practice Remedy. In some instances the employer will have engaged in illegal tactics to thwart the union's attempts to organize the employees. On occasion these tactics might so severely prejudice the union's position that it cannot fairly compete in a Board representation election. If the Board determines that such pervasive unfair labor practices have intimidated the workers to the point that a fair and free election is impossible, it might certify the union as the bargaining representative and order the employer to bargain in good faith without the necessity of an election. Thus, it is imperative during the organizing period that the employer refrain from making either threats of reprisal if the union is voted in or promises of benefits if the employees vote against the union.

§6:42. Bargaining Unit Determination.

Before the Board may conduct a representation election, it must determine which employees make up an appropriate bargaining unit. This bargaining unit is made up of those employees who have such a community of interest that it would be appropriate for one union to represent them all. For example, the Board might designate a unit comprised of all production workers or all clerical workers or all security workers. In some cases it may designate a unit that contains more than one job description. The

key consideration is whether the union can represent all of the employees in the unit without a conflict of interest.

The employer and the union can agree on the jobs or positions to be included in the bargaining unit. In cases where the dispute centers around the voting eligibility of particular individuals whose positions are within the defined bargaining unit but who might, for other reasons, be ineligible to vote, the parties may stipulate to an election and allow the disputed individuals to vote subject to challenge. In that event, the ballots will be sealed and impounded at the time of the election. If, after counting the unchallenged ballots, it is determined that the challenged ballots could affect the outcome of the election, the Board will conduct an investigation, giving each side the opportunity to present evidence, and then make a determination on whether the challenged voter is eligible or not. The challenged ballot will be opened and counted only if the voter is found to be eligible. The challenging party may withdraw the challenge at any time, whereupon the ballot will be opened and counted. This commonly occurs when, after counting the unchallenged ballots, the challenging party believes that the challenged ballots will be in its favor and swing the election in its favor.

If, however, the parties are unable to agree upon the composition of the bargaining unit, the Board will conduct a hearing before the election to determine which employees make up the appropriate bargaining unit. It will then designate the bargaining unit and proceed with the election. In any event, even if there has been no stipulation, either party may challenge particular voters, in which case the same procedure as specified above for impounding the ballots and resolving the challenge will be followed.

§6:46. Disputes Regarding Unit Determinations.

If the employer disputes the Board's designation of the bargaining unit, its only recourse is to refuse to bargain with the union in the event the union wins the election. This will ordinarily prompt the union to file an unfair labor practice charge, which the employer may defend before the Board by claiming the designation of the bargaining unit to have been inappropriate. The employer may thereafter pursue a petition for review before the U.S. Court of Appeals if the Board's determination is adverse to the employer.

§8:07. Exclusive Representation.

A labor organization that has been certified as the bargaining representative of a group of employees has the exclusive right to bargain on their behalf with respect to wages, hours and all other terms and conditions of employment. This means that all employees in the bargaining unit, not just those who are members of the union or who supported the union in the representation election, must look to that union for representation. Dissident members of the unit may not approach the employer individually to negotiate their own salaries or working conditions; instead they are subject to whatever terms the union and the employer agree to through the process of collective bargaining.

Sec. 102.62 Consent election agreements.-

(a) Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the Regional Director, enter into a consent election agreement leading to a determination by the Regional Director of the facts ascertained after such consent election. The rulings and determinations by the Regional Director of the results thereof shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board.

(b) Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into an agreement providing for a waiver of hearing and consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary.

Sec. 102.67 *Proceedings before the Regional Director; further hearings; briefs; action by the Regional Director; appeals from action by the Regional Director; statement in opposition to appeal; transfer of case to the Board; proceedings before the Board; Board action.-*

(a) The Regional Director may, after a hearing, proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining and to direct an election. Any party desiring to submit a brief to the Regional Director shall file the original and one copy thereof within 7 days after the close of the hearing.

(b) A decision by the Regional Director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the Regional Director shall be final: *Provided, however,* That within 10 days after service thereof any party may

file a request for review with the Board in Washington, D.C. The Regional Director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted, ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

(d) The Board will grant a request for review only where compelling reasons exist therefore. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Sec. 102.69 *Election procedure; tally of ballots; objections; certification by the Regional Director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.-*

(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose region the proceeding is pending. All elections shall be by secret ballot. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded.

(b) If the challenged ballots are insufficient in number to affect the results of the election, the Regional Director shall forthwith issue to the parties a certification of the results of the election, including certifications of representative where

appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(c) (1) If the challenged ballots are sufficient in number to affect the results of the election, the Regional Director shall initiate an investigation, as required, of such challenges.

(2) If a consent election has been held pursuant to section 102.62(b), the Regional Director shall prepare and cause to be served on the parties a report on challenged ballots, including his recommendations, which report, together with the tally of ballots the Regional Director shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots or on objections, or on both, any party may file with the Board in Washington, D.C., exceptions to such report, with supporting documents. Within 7 days from the last date on which exceptions and any supporting documents and/or supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief, with supporting documents.

(3) If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the Regional Director may (i) issue a report on challenged ballots, as in the case of a consent election pursuant to paragraph (b) of section 102.62, or (ii) exercise his authority to decide the case and issue a decision disposing of the issues, and directing appropriate action or certifying the results of the election.

(d) In issuing a report on challenged ballots, or in issuing a decision on challenged ballots, the Regional Director may act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer. Such hearing shall be conducted with respect to those challenges which the Regional Director concludes raise substantial and material factual issues.

(e) In a case involving a consent election held pursuant to section 102.62(b), if exceptions are filed, either to the report on challenged ballots or on objections, or on both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith. If it

appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the Regional Director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer.

(f) In any such case in which the Regional Director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 3 days after the revised tally of ballots has been furnished, the Regional Director shall forthwith issue to the parties certification of the results of the election with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

National Labor Relations Board v.
Hendricks County Rural Electric Membership Corp.
454 U.S. 170 (1981)

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether an employee who in the course of his employment may have access to information considered confidential by his employer is impliedly excluded from the definition of "employee" in §2(3) of the National Labor Relations Act and denied all protections under the Act.

Mary Weatherman was the personal secretary to Harold Dillon, the general manager and chief executive officer of respondent Hendricks County Rural Electric Membership Corp. (Hendricks), a rural electric membership cooperative. She had been employed by the cooperative for nine years. In May 1977, she signed a petition seeking reinstatement of a close friend and fellow employee, who had lost his arm in the course of employment with Hendricks and been dismissed. Several days later Weatherman was discharged.

Weatherman filed an unfair labor practice charge with the National Labor Relations Board (Board), alleging that the discharge violated the National Labor Relations Act (NLRA or Act). In response to Hendricks' assertion that Weatherman was excluded from coverage of the NLRA, the Board found that Weatherman was not privy to the confidences of her employer in the field of labor relations, and thus concluded that she did not fall within the broader definition of confidential secretary. The Board's decision stated in part:

> Although Weatherman typed all of [general manager] Dillon's letters, this correspondence apparently did not relate to labor relations or personnel matters other than occasional letters referring to the dates of negotiating meetings with a union. Nor is there any evidence that it concerned confidential matters of any description. Weatherman generally did not place Dillon's telephone calls, nor did she keep a record of his appointments. Weatherman did share a partitioned office with Dillon, but no personnel records or confidential records of any type were kept there, except some papers concerning labor negotiations in a file behind Dillon's desk.

> Weatherman did not attend meetings of Hendricks' board of directors or other management meetings. However, she did type minutes of meetings of the board of directors and the agenda for such meetings. While these meetings apparently occasionally involved personnel matters, there is no indication that such matters, or any other issues discussed during them, were confidential. Weatherman did not type internal memoranda regarding labor relations or personnel or employment matters. Finally, and most significantly, Dillon did not maintain secret or classified papers or documents.

For over 40 years, the Board, while rejecting any claim that the definition of "employee" in §2(3) of the NLRA does not encompass confidential employees, has excluded from the collective-bargaining units determined under the Act those confidential employees satisfying the Board's labor-nexus test. Hendricks argues that, contrary to the Board's practice, all employees who may have access to confidential business information of any kind are impliedly excluded from the definition of employee in §2(3).

Although §2(3) of the Act does not specifically exclude confidential employees from its coverage, the Board has been faced with the argument that all individuals who have access to confidential information of their employers should be excluded, as a policy matter, from the definition of "employee." The Board has rejected such an implied exclusion. But in fulfilling its statutory obligation to determine appropriate bargaining units under the Act the Board adopted special treatment for the narrow group of employees with access to confidential labor-relations information of the employer by excluding these individuals from bargaining units. The Board's rationale was that "management should not be required to handle labor relations matters through employees who are represented by the union with which the company is required to deal and who in the normal performance of their duties may obtain advance information of the company's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters." Hoover Co., (NLRB 1944).

Following this formulation the Board has routinely applied the labor-nexus test to identify those individuals who were to be excluded from bargaining units because of their access to confidential information. Moreover, the Board has refined the labor nexus test to limit the-term "confidential" so as to embrace only those employees who assist and act in a confidential capacity to persons who exercise "managerial" functions in the field of labor relations. Ford Motor Co., (NLRB 1946).

We find no merit in Hendricks' argument that the Board has applied the labor-nexus test inconsistently. The Board, in excluding "confidential employees" from bargaining units, routinely applies such a test. For example, in B.F.Goodrich Co., (NLRB 1956), the Board underscored its intention "in future cases . . . to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." In succeeding years, while continuing to apply the labor-nexus test, the Board has deviated from that stated intention in only one major respect: it has also, on occasion, designated as confidential employees persons who, although not assisting persons exercising managerial functions in the labor-relations area, "regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations." Pullman Standard Division of Pullman Inc., (NLRB 1974).

In the present case, the Board determined that the personal secretary, Mary Weatherman, was not a confidential secretary because she "did not act 'in a confidential capacity"' with respect to labor-relations matters. We agree. In doing so, however, we do not suggest that personal secretaries to the chief executive officers of corporations will ordinarily not constitute confidential employees. Hendricks is an unusual case because the Board found that Weatherman's tasks were "deliberately restricted so as to preclude her from gaining access to confidential information concerning labor relations." Whether Hendricks imposed such constraints on Weatherman out of specific distrust or merely a sense of caution, it is unlikely that Weatherman's position mirrors that of executive secretaries in general.

We therefore remand with directions to enter an order enforcing the Board's order.

Prudential Insurance Company of America v.
National Labor Relations Board
770 F.2d 122 (4th Cir. 1987)

This is a petition of Prudential Insurance Company of America (Prudential) to review an order of the National Labor Relations Board (Board) that Prudential bargain with the United Food & Commercial Workers International Union (Union), and the Board's cross petition for enforcement. Prudential challenges a representation election based on the propriety of a bargaining unit which included an alleged confidential employee. We hold that the employee was not properly included in the bargaining unit and remand the case with instructions.

The Union filed a petition with the Board seeking to represent a unit of office and clerical employees at Prudential's Cape Cod district office located in Hyannis, Massachusetts. These employees, referred to by Prudential as the field service staff, support the company's sales agents in their selling and service functions. There are several job categories that are involved in these functions: service representative, senior service representative, service assistants, service coordinator, senior service coordinator, and assistant to the district manager. These positions comprise the bargaining unit sought by the Union and approved by the Board. Prudential's challenge is directed to the inclusion within the unit of the assistant to the district manager, Patricia Roberts (Roberts).

In May 1985, the Board conducted a pre-election hearing. Prudential contended that the inclusion of Roberts was improper because she was a confidential employee under Section 2(3) of the National Labor Relations Act (Act). After hearings, the Board's Regional Director concluded that Roberts was not a confidential employee and that she should therefore be included in the bargaining unit. The Regional Director's conclusion was based on his finding that the district manager does not formulate, determine and effectuate labor relations policies. Moreover, he found that Roberts did not assist or act in a confidential manner in her relations with the district manager. Prudential subsequently filed a request for review with the Board, challenging the Regional Director's inclusion of Roberts within the bargaining unit. The Board denied this request.

On August 28, 1985, the Board's regional office conducted a secret ballot election, which was won by the Union. The Board then certified the Union as the bargaining

unit's representative. Prudential then requested Board review of the Regional Director's certification of the Union as representative. However, this request for review was denied by the Board on October 29, 1985, as raising "no substantial issues warranting review."

Section 2(3) of the National Labor Relations Act provides that the "term 'employee' shall include any employee . . . ." But, notwithstanding that under a literal reading of this language Roberts would be an employee, both the Board and the courts exclude certain confidential employees from collective bargaining units.

In order to evaluate Prudential's claim that the assistant to the district manager should have been excluded from the field service bargaining unit as a confidential employee, it is necessary for us to examine the district manager's responsibilities as well as the relationship between the assistant and the district manager. In NLRB v. Hendricks, the Supreme Court approved the Board's "labor-nexus" rule as determinative of whether a worker is to be deemed a confidential employee. Under this labor-nexus rule, the term "confidential" embraces only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations.

Here, the district manager generally supervises the day-to-day operations of the office, operating under general rules set by the home office. He recommends the hiring, firing, and disciplining of the office employees and he may, under certain conditions, fire summarily. He trains the local employees and, within limits set out by the company, makes recommendations as to promotions, increases and allowances. Additionally, Prudential's district manager is the employer's representative at Step One of the grievance procedure. He may respond to Step One or formulate and recommend a response for his superior. He is also responsible for ensuring that Prudential's national labor and personnel policies are carried out in the district office. Accordingly, we conclude that the district manager here exercises managerial functions in the field of labor relations and hold that the Board erroneously decided that the district manager did not exercise sufficient managerial functions in the field of labor relations.

This conclusion, however, does not end our review. We must also examine the Regional Director's further finding that Roberts, the assistant to the district manager, did not assist or act in a confidential manner in her relations with the district manager.

Roberts handles correspondence and clerical work for the district manager. Thus, she performs customary secretarial tasks, such as typing and filing. Roberts maintains files of grievances submitted by the Union and types the district manager's correspondence and maintains a file of such correspondence in her desk, which is unlocked. Roberts also compiles and types office sales reports and submits them to the appropriate regional office. Roberts types correspondence concerning the employment, compensation, evaluation and discipline of district agents. She has access, as needed, to employees' personal job history files, which are maintained in a locked portion of the district manager's desk. She also shares a private telephone line with him, but she has never been asked by him to listen in on a conversation. Moreover, there is undisputed documentary evidence that Prudential's job description questionnaire for the position of assistant to the district manager describes the job as "confidential" by its very nature.

The confidential character of the position of assistant to the district manager is further elaborated on in Prudential's personnel policy handbook. Significantly, both the district manager and Roberts testified that the Company had told her that her job was confidential.

We thus find that the Regional Director's determination that Roberts did not assist or act in a confidential manner to the district manager is not supported by substantial evidence. Having concluded that Roberts does serve in a confidential capacity to a manager who exercises sufficient managerial function in the field of labor relations, we are of the opinion that she should not be included within the bargaining unit in question. Accordingly, we reverse the Board's finding that Roberts was not a confidential employee and remand this case for proceedings consistent with this opinion.

National Labor Relations Board v.

Lorimar Productions, Inc.

771 F.2d 1294 (2nd Cir. 1985)

The National Labor Relations Board (Board) applies for enforcement of its order requiring that Lorimar Productions, Inc., (Lorimar) bargain with Production Office Coordinators and Accountants Guild Local 717 (Union). Lorimar cross-petitions for review, contending that its refusal to bargain was justified because the Board erred in certifying a unit composed of estimators who are confidential employees not covered by the National Labor Relations Act (NLRA).

Lorimar is a New York corporation whose business is the production of motion pictures and television programs. On November 25, 1980, the Union filed a representation petition with the Board seeking certification as the bargaining representative of Lorimar's estimators. The Regional Office conducted a representation hearing on December 19,1980, to determine a unit appropriate for collective bargaining. Following the hearing, the Board certified a unit composed of the estimators and directed an election. Lorimar filed a request for review of the Board's decision, arguing that the estimators were confidential employees. The request for review was denied and the election was held. The Union won the election by a vote of eight to three.

Lorimar refused to bargain with the Union. The Union filed an unfair labor practice charge alleging that Lorimar had thereby violated the NLRA. Following a hearing, the Board ordered Lorimar to cease and desist from refusing to bargain with the Union.

The NLRA requires that two categories of confidential employees be excluded from bargaining units: (1) those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations and (2) those employees who, in the course of their duties, regularly have access to confidential information concerning negotiations. The rationale behind the exclusion of confidential employees from the bargaining unit is that employees should not be placed in a position which creates a potential conflict between the interests of the employer and the union.

> The central inquiry in ascertaining whether an employee falls within the first category is whether the employee is in a confidential work relationship with a specifically identifiable managerial employee responsible for labor policy. The record shows that

the estimators are supervised by vice president/controller Mary Van Houten, who has no authority to make decisions on labor policy matters.

Lorimar argues that because estimators "work with" unit production managers, the estimators have a confidential relationship with unit production managers. The record demonstrates, however, that the estimators relationship with the unit production managers is limited to obtaining information from them for inclusion in the budget, and on occasion providing information regarding existing or mathematically predictable labor costs. The estimators' occasional performance of such clerical duties for the unit production managers does not demonstrate the existence of a confidential work relationship where the estimators are not generally under their supervision.

Lorimar also contends that the estimators assist the unit production managers in making labor relations decisions, and concludes that performance of these duties places the estimators in a confidential work relationship. The record does establish that on at least one occasion an estimator did calculate Lorimar's potential liability prior to settlement of a meal payment grievance. An employee is not regarded as confidential, however, simply because the employee supplies information to someone involved in the handling of grievances.

For these reasons, Lorimar's estimators do not fall within the first category of confidential employees.

Lorimar's estimators also fall outside of the second category of confidential employees because they do not have access to confidential information that might be used in future contract negotiations. The evidence presented at the representation hearing established that the estimators' duties include the preparation of a budget showing estimated costs for each episode or production, the monitoring of those costs during production, and the preparation of a post-production report comparing projected and actual costs. The estimators survey the following categories of information in preparing their budgets: (1) budget information received from various department heads; (2) existing labor contracts; (3) "deal memos" (confidential employment agreements negotiated with individual employees with rates and terms of employment above the scale of the collective bargaining agreement) or "start cards" (confidential documents containing a summary of the terms of the deal memo and W-4 tax information); (4) the terms of labor grievance settlements; and (5) employees' time cards.

Lorimar argues that the estimators' access to information regarding the precise earnings of each employee, records detailing the amount of any monetary settlement reached in a labor dispute, and capital budget information such as licensing fee revenue received from the networks, constitutes access to confidential information foreshadowing Lorimar's future bargaining position and potentially acceptable future labor rates. We disagree. Where there is

no showing that the capital budget indicates the precise labor rates which the company would accept, or that it otherwise discloses the company's bargaining position, employees who have access to personnel or statistical information upon which the company's labor relations policy is based are not necessarily confidential employees.

If we were to accept Lorimar's argument that the estimators' access to information enables them to predict potentially acceptable future labor rates, then virtually every employee with access to information concerning company income, expenses, or past and present labor costs would be confidential because the information could be used to predict the company's future bargaining position.

The Board's factual finding that Lorimar's estimators are not confidential employees is supported by substantial evidence in the record. Because the Board correctly applied the law to its finding in determining that the estimators should be included within the bargaining unit, we deny Lorimar's cross-petition for review of the Board's unit determination.

ANSWER 1 TO PERFORMANCE TEST A

Dewey Gonzales & Howe
Attorneys and Counselors at Law
181 1 Tower Ave. Suite 1200
Los Diablos, Columbia

To: Mr. Claude Barrow
CEO, Sierra Corporation

From: Applicant

Re: Pre-Counseling Letter Re: Local 841

Dear Mr. Barrow:

I write this pre-counseling letter to you on behalf of Dewey Gonzales, in anticipation of your meeting with Igor Moon tomorrow. This letter concerns the issue of the election Local 841 apparently intends to hold to gain representation of Sierra's 15 clerical workers.

I. Your Goals

I understand that you have deemed Dorothy Street, David Drake, and Patricia Norris to be key employees, and that you do not want these key employees to be included in any bargaining unit that the Union might end up representing. I also understand that despite a letter from Mr. Lewis indicating that the Union has authorization cards from 10 of the 15 clerical workers, you are not convinced that the Union would ultimately win an election, especially if those three key employees are entitled to vote. Thus it appears to me that your goals are to exclude those key employees from the bargaining unit, or alternatively, and at a minimum, to ensure that they be allowed to vote. I understand that it is Sierra's position that if these employees were included in the bargaining unit, it would place both Sierra and the employees in untenable positions. Sierra would be unable to assign them work that might expose them to personnel, labor-relations, or plant-maintenance issues, and the key employees would likely be under pressure from the Union to provide the Union with information that would aid the Union's bargaining position.

II. The NLRB's Criteria for Excluding Employees because of Access to Confidential Information

In order to keep these key employees out of the bargaining unit comprised of clerical workers, it is necessary that the NLRB (or "the Board") deem them "confidential" employees that satisfy the Board's "labor-nexus test." As stated in Hendricks County, a Supreme Court case on the issue, this means the Board gives "special treatment to the narrow group of employees with access to confidential labor-relations information of the employer by excluding those individuals from bargaining units." Under this test, confidential employees are those employees who "assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." Hendricks County. These managerial functions include formulating, determining, and effectuating management policies in the labor-relations field. Hendricks.

Additionally, an employee may be confidential for the Board's purposes even if that employee does not assist a person performing managerial functions if the employee regularly has "access to confidential information concerning anticipated changes which may result from collective - bargaining negotiations." Hendricks, quoting Pullman Standard.

These legal definitions basically mean that if you have an employee who assists a manager who has labor-relations responsibilities, or if you have an employee who has regular access to confidential information concerning management's anticipated collective bargaining positions, and that access is obtained because of that employee's job duties, then such an employee should be considered a confidential employee and excluded from the bargaining unit.

The Board's rationale for excluding such employees, Mr. Barrow, has been for 45 years that "management should not be required to handle labor relations matters through employees who are represented by the union with which the company is required to deal and who in the performance of their duties may obtain advance information of the company's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters." Hendricks, quoting Hoover Co. Simply put, a company should not have to allow the Union with which it must deal to see confidential information about its bargaining position, and if certain employees have access to that information, it would create a conflict of interest if those employees were also represented by the Union.

III. Likelihood that Dorothy Street. David Drake, and/or Patricia Norris Would Be Excluded

Upon an initial examination, it appears that both Ms. Street and Mr. Drake should be treated as confidential employees, but it is rather unlikely that the Board will find that Ms. Norris is such an employee.

Applying the above legal criteria to Ms. Street first, it should be noted that because she is your secretary, she has access to every file at Sierra. She receives information that goes to the Board of Directors and to all management. As she does your correspondence, arranges your meetings, attends meetings, and prepares, maintains, and distributes minutes of those
meetings, Ms. Lani Carovick tells us that "almost nothing happens at the highest levels of the company which is not known to" Ms. Street.

Mr. Barrow, while I understand that you do not get involved in day-to-day labor relations and personnel matters, it is also my understanding that you, as CEO, have the final say about things relating to Sierra's workforce. It is clear that Ms. Street, because of her job duties in assisting you, has the requisite contact with a person who formulates, determines, and effects management policies in labor relations. In Hendricks, the Supreme Court case, the personal secretary of a company's GM and CEO was found not to be a confidential employee, because she was not privy to confidential information. The Board found that the secretary's tasks were "deliberately restricted so as to preclude her from gaining access to confidential information concerning labor relations." You have not, to my knowledge, thus insulated Ms. Street from confidentiality; to the contrary, her job description as executive secretary clearly specifies that she is to maintain confidential relationships with the Executive Staff, the Board of Directors, and the CEO. It also lays out some confidential clerical/secretarial support tasks unique to your office. In Prudential, a case which is not binding on our Circuit (which means a Court in Columbia need not necessarily follow it, unlike a Supreme Court case, which a Columbia Court must follow), but is persuasive (which means a Columbia Court would carefully compare that case with the one it was considering), the fact that a secretary's job description noted that the duties were "confidential," as well as the fact that the secretary had been directly told of the confidential nature of her duties, was significant. This is encouraging for Ms. Street's situation, obviously. While Ms. Street apparently does not keep any personnel, grievance, labor, or employee files designated as such, the fact of her intimate knowledge of the assuredly confidential inner workings of Sierra's upper management, including labor relations issues, satisfies the Board's 18t labor-nexus test. Therefore she should be excluded from the clerical workers bargaining unit, and it is almost certain that she would be excluded by the Board.

memoranda for this team, Mr. Drake is privy to management decisions before they are made public. This regular contact with confidential labor-relations information underscores the need for Mr. Drake to be excluded from the bargaining unit as a confidential employee. It is highly likely that Mr. Drake would be excluded by the Board.

However, Ms. Patricia Norris does not seem to have the same contact with confidential labor relations information that Ms. Street and Mr. Drake have. While she does have access to confidential information, that information is not directly related to personnel matters, but is instead financial information affecting the fiscal condition of the company. This distinction is important for at least two reasons. First of all, the labor-nexus test explained in Hendricks is careful to state that the confidential information be in the field of labor-relations. The test is explained several times in the Court's opinion, and each time it is specified that the confidential information need be labor-relations oriented. Also, in Lorimar, another non-binding but persuasive case from another jurisdiction, it was held that a confidential employee must be in a confidential work relationship with a managerial employee responsible for labor policy. In Lorimar, which dealt with whether estimators who worked on the budgetary concerns of the production of motion pictures and television programs, it was found that a casual connection to the company's labor-relations policies, such as if an employee merely has access to personnel or statistical information upon which a company's labor-relations policies are based, does not necessarily make that employee confidential.

Ms. Norris has access to sensitive and confidential financial information affecting the financial condition of Sierra, but her responsibilities do not appear to be directly related to personnel or labor-relations matters. Nor does her supervisor, Paul Young, VP of Purchasing, seem to have labor-relations responsibilities. Because of the Board's expressed rationale for finding confidentiality in relation to the unfairness posed to the Company and to the employee, if the employee has regular access to confidential labor relations information that would be of interest to the Union, it seems unlikely that the Board would find this rationale compelling in the case of an employee who has no such access, although it is clear that Ms. Norris has access to confidential information not related to labor-relations. Therefore, it does not seem likely that the Board would agree to exclude Ms. Norris from the bargaining unit.

IV. Courses of Action Available to You

I understand that Mr. Lewis has requested that you voluntarily recognize Local 841 as the clerical workers' union, and that he has informed you that if you do not do so voluntarily, he intends to file a petition with the Board for a certification election. I intend to explain your available courses of action and the legal, economic, and personal consequences of each.

First of all, you could simply acquiesce to his demand, and voluntarily recognize the Union as the clerical workers' representative, without ever involving the Board. Whether you should do this depends on several factors. The most obvious and perhaps most significant advantage of this maneuver is that it does not present any appearance of distrust of your key employees. If you contest their inclusion in the bargaining unit, it might appear to them that you think they might be disloyal to Sierra if they were represented by the Union. While I understand that you in fact place complete trust and confidence in these obviously valued employees, and that you intend only to keep them and Sierra from being placed in an exceedingly difficult position, your unwillingness to permit them to be part of the bargaining group might be misinterpreted by them, or used as a rallying tool by the Union (e.g., "management doesn't even trust you . . . how can you align with them? Let us represent you!°'1.

However, a voluntary agreement would have several drawbacks for you. Most transparently, it would at once accomplish precisely what you seek to avoid - it would place those key employees in the untenable position of access to confidential information and simultaneous Union representation, forcing them to walk a nearly impossible line, and you to refrain somehow from exposing them to confidential information, when the nature of their jobs requires such exposure.

Secondly, a voluntary agreement deprives you of some time that you could profitably use to educate your workers. Let us be quite clear - I am not at all suggesting that you do anything improper or engage in unfair labor practices by offering them rewards for not unionizing or threatening them with punishments if they do. Quite the contrary, I am suggesting that you could use the time the Union will be forced to spend tied up in procedural matters by explaining to the workers what their options are, and the relative advantages and disadvantages of each. Doing so might in fact help to sway critical votes away from Local 841, which may not even be the union best suited to meet your clerical workers' needs. Indeed, the Union says it has 10 authorization cards. It would need the support of 8 clerical workers in an election. You therefore would need to swing only three votes of workers who signed authorization cards, and talk to the five who did not do so, in order to ascertain why they did not do so. It may be that your three key employees signed authorization cards, without understanding your position as to the confidentiality issues that would arise if they were represented by the Union. Again, without doing anything impermissible, it would be perfectly legitimate for you to educate yourself and the workers as to the relative merits and drawbacks of union representation, and of representation by this Union in particular.

Third, a voluntary agreement would be expensive for you, as you would have to redefine job duties, possibly create additional positions, and do inefficient things in order to ensure that Sierra's interest in maintaining the confidentiality of its labor-relations information would not be disturbed. I therefore advise against a voluntary agreement.

If Mr. Lewis does in fact petition for an election while refusing to stipulate to the exclusion of your key employees, you could stipulate to the election but allow the 3 key employees to vote subject to challenge. In that event, the challenged ballots will be sealed and impounded at the time of the election. If the outcome of the election demonstrates that the challenged ballots could affect the outcome of the election, the Board would conduct an investigation, allowing Sierra and the Union to present evidence, and then make a determination as to whether each challenged voter is eligible. Challenged ballots would be opened and counted only upon a finding that the voter was eligible. If it appears to you that the 3 employees would vote for you, you would be free at any time to withdraw the challenge and have each ballot opened and counted. This would satisfy your goal of ensuring that the key employees be allowed to vote, and it would in any event likely result in successfully excluding at least 2 of the 3 employees.

If you and the Union cannot agree upon the composition of the bargaining unit, the Board would conduct a hearing before the election to determine which employees should go into the bargaining unit. In any event, even with no stipulation, you would be entitled to challenge particular voters, with the same procedures as outlined above. This method has the advantages of presenting you with time to educate the voters, an opportunity to have your positions heard by the Board, and a chance to set the issues up in such a way as to avoid any misinterpretation of your actions by either the key employees, the other employees, or the Union. It would be slightly more expensive in the short term, because the hearing and the putting on of evidence might require a loss of person-hours and you may incur the attendant legal expenses, but it would likely pay for itself over the long run, because you would have the opportunity to get at least two employees, and possibly all three, excluded, obviating the need for costly and inefficient workarounds designed to prevent them from continuing to be exposed to confidential information that is basic to their job duties. I find this course of action to be desirable.

Supreme Court!) Finally, this course of action would be expensive, as you would have to pay litigation expenses for an appeal, and those expenses could be quite substantial.

In summary, Mr. Barrow, I advise you to seek a stipulation from Mr. Lewis regarding the exclusion of the three key employees, while agreeing that an election can be held. If he will not so stipulate, then I suggest that you inform the Board of your disagreement and obtain a hearing, where you will be able to make Sierra's positions known. If, as is quite unlikely, that hearing does not produce a satisfactory result, you would then be able to decide whether to pursue Sierra's legal right to an appeal. And in any event, in all this time, you could educate and inform the workers so that they might by perfectly legitimate and fair means be able to decide whether to allow themselves to be represented by Local 841.

I thank you for the opportunity to assist you. Please contact me or anyone else at Dewey Gonzales if you have any questions prior to or after tomorrow's meeting with Igor Moon.

Very truly yours,

Applicant

ANSWER 2 TO PERFORMANCE TEST A

Pre-Counseling Letter

Dear Mr. Barrow:

Re: Sierra Corporation - Local 841 Clerical Worker Organizing Activity

As requested by Igor Moon, I am writing to you in order to provide some background information for your consideration with respect to the present attempt by Local 841 to organize the clerical workers at Sierra Corporation.

1. Your Objectives

As I understand it, your goals with respect to Local 841's efforts are:

(i) Prevent Local 841 from representing Sierra's clerical workers; and

(II) If Local 841 is successful in representing Sierra's clerical workers, ensure that Dorothy Street, David Drake and Patricia Norris are excluded from any bargaining unit the union might end up representing because of their access to confidential corporate information.

This letter will address those goals by (i) explaining the substantive criteria the National Labor Relations Board ("NLRB") applies in determining whether or not to exclude "confidential" employees from bargaining units, (ii) assess, on the basis of these criteria, the likelihood of Ms. Street, Mr. Drake and Ms. Norris (the "Confidential Employees") being excluded from the bargaining unit Local 841 seeks to represent, and (iii) suggest various courses of action available to Sierra in response to Local 841's voluntary recognition request as well as the potential petition for a representation election without the exclusion of Ms. Street, Mr. Drake and Ms. Norris.

2. NLRB "Confidential" Employee Criteria

In seeking the certification of Sierra's clerical workers, Local 841 has indicated that it will insist on representing all clerical employees, including the Confidential Employees. Although there is a clear practical difference between the Confidential Employees and

other clerical workers not privy to confidential corporate information, the NLRB and the courts have long held that this is not a sufficient basis for excluding them from the definition of "Employee" under §2(3) of the National Labor Relations Act ("NLRA"). As "Employees" for the purposes of the NLRA, the Confidential Employees are subject to inclusion in the bargaining unit sought by Local 841.

However, the courts and the NLRA have recognized the prejudice that might result to a corporation if one or more of its employees who are privy to confidential labor relations information were also part of a bargaining unit. Therefore, employees who meet the tests of form by the courts and the NLRA for being "confidential" will be excluded from any bargaining unit they normally would be included in.

There are generally two categories of confidential employees who will be excluded from bargaining units:

(1) employees who assist and act in a confidential capacity to labor relations management, and

(2) employees who regularly have access to confidential information concerning labor negotiations.

This is sometimes called the "labor-nexus" rule and the focus is clearly on access to confidential labor relations information of the corporation.

With respect to part (1) of the above test, the employee must not only work with a labor relations manager but must do so in a way that is confidential, both in the nature of the relationship between the manager and the employee and in the type of information that the employee is exposed to.

With respect to part (2), access to confidential corporate information by itself is not sufficient. The information must relate to the company's bargaining position or other confidential labor relations matters that would prejudice the company in future contract negotiations if in the hands of the union.

3. Would the "Confidential Employees" be excluded from the proposed clerical worker bargaining unit?

Based on the above criteria, I will now turn to each of the Confidential Employees to evaluate the likelihood of their exclusion from the proposed clerical worker bargaining unit on confidential worker grounds.

David Drake

Mr. Drake is secretary to Lani Carovick, V.P. Personnel. His job description indicates that he is responsible for a number of typical secretarial tasks under Ms. Carovick's general description. These include preparing and transcribing letters, taking minutes, scheduling meetings, assisting with the preparation of contracts and reports and compiling information for the Board of Directors.

Based on our conversations with and correspondence from Ms. Carovick, we know that Mr. Drake is heavily involved in almost all of Sierra's personnel matters. He maintains all personnel files and evaluations, all union files (including grievances, correspondence and legal matters). While he doesn't attend Sierra management meetings, David does transcribe management responses to employee grievances and grievance procedures and has access to all of Ms. Carovick's files.

All of these factors strongly indicate that Mr. Drake satisfies both alternatives of the NLRB's test for "confidential" employees and would likely be excluded from any clerical bargaining unit. With respect to the first test, Ms. Carovick, as V.P. Personnel, clearly has managerial functions in the field of labor relations. As her assistant, we know that Mr. Drake regularly has access to confidential materials such as draft responses to employee grievances and the company's complete union file. Although his job description does not indicate that his duties are "confidential" in nature, it is safe to assure that this is, in fact, what they are. This access to confidential information covering labor relations also satisfies the second test explained above.

As a result, Mr. Drake would almost certainly be excluded from any clerical bargaining unit that is found.

Dorothy Street

Ms. Street is, of course, your secretary. She is responsible for many of the same kinds of tasks as Mr. Drake, but on a higher level. We understand that she works directly with you and the Board. She prepares all of your correspondence, takes telephone calls, schedules meetings and attends and takes minutes at board, executive committee and management meetings.

As a result, Ms. Street is privy to nearly all of Sierra's confidential information and her job description clearly indicates her responsibility for "confidential" tasks that are unique

to the office of the CEO. With respect to labor relations matters, Ms. Street's exposure to confidential information comes primarily through information that goes to all management and the Board. She also has access to all files at Sierra.

Based on these factors, we would expect that Ms. Street would be treated as a confidential employee and excluded from any clerical bargaining unit. Under the first test, although you do not typically get involved in day-to-day labor relations and personnel matters, it would be very difficult to argue that as CEO you do not exercise managerial functions in the area of labor relations, albeit at a very high level. For example, it would be impossible for Sierra to execute a collective bargaining agreement or settle a significant employee grievance without your knowledge and consent. Furthermore, as Ms. Street has access to virtually all high level corporate information as well as all corporate files, she is acting in a confidential nature in executing her duties (as evidenced by her job description). This access to confidential high level labor relations information also meets the second test outlined above, at it would clearly be prejudicial to Sierra if, in the collective bargaining example again, a union had access to the same information Ms. Street would.

Therefore, it is also highly likely that Ms. Street would be excluded as a confidential employee.

Ms. Norris

We understand that Ms. Norris is administrative secretary to the head of the Purchasing Department. She has the same job description as Mr. Drake and is primarily responsible for maintaining the records of that department. Her duties do not touch directly on labor relations matters although she does have access to sensitive and confidential financial information of Sierra and attends, but does not participate in, meetings relating to product development.

It is unlikely that Ms. Norris would be excluded from the clerical bargaining unit. First, her supervisor, the head of the Purchasing Department, does not exercise any managerial functions in the labor relations field. Second, none of Ms. Norris's duties give her access to confidential labor relations information. While we can certainly understand why you would prefer that a person with sensitive corporate financial information not be part of a union, the courts have clearly stated that access to this type of information, by itself, does not present any potential of compromising a company's bargaining position on labor matters. As a result, based on the facts that we currently have, Ms. Norris would not be excluded from the potential clerical bargaining unit.

4. What courses of action are available with respect to:

a) Local 841 's voluntary recognition request

Per their letter of February 26, 2001, Local 841 has requested that Sierra voluntarily recognize it as the bargaining representative of the clerical employees (including the Confidential Employees). Since Local 841 has apparently secured authorization cards from 10 of Sierra's 15 clerical workers, Local 841 apparently feels confident that it would win a representation election and is asking you to forgo the formality of holding the election by your concession. Sierra has two choices here, agree to voluntarily recognize or refuse to do so.

If Sierra agrees to voluntarily recognize the bargaining unit, the bargaining unit is automatically recognized by the NLRB and no further actions on either party's part are required. Despite the fact that Local 841 has secured 10 authorization cards (which, it should be noted, have no legally binding effect), it is important to realize that Sierra is not obliged to voluntarily recognize the bargaining unit.

It is true, as Mr. Lewis points out, that voluntary recognition would avoid a time consuming (and potentially costly) NLRB election. This would allow Sierra and the union to move right to collective bargaining. It could also enhance or at least maintain any existing goodwill between Sierra and the Union as NLRB elections can be contentious affairs that evoke hard feelings on both sides. Given that Local 841 represents all of your 146 technicians, this is not a small point.

However, we would recommend against voluntary recognition because the bargaining unit proposed by Local 841 includes the Confidential Employees. If the bargaining unit is recognized as proposed, the NLRB would consider them part of the unit whether they liked it or not. Local 841 would become the exclusive representative of all the clerical employees and you would lose your ability to deal independently with any of the Confidential Employees. Based on your stated goals, we do not believe that this would be a good outcome and advise against this alternative.

Refuse

If you refuse the request for voluntary recognition, Local 841 has indicated that it will petition the NLRB for a representation election.

Because Local 841 has secured authorization cards from the requisite 1 /3 of bargaining unit employees, it is entitled to such an election. As noted above, this process is more adversarial and time-consuming than voluntary recognition, but since an election presents opportunities to prevent recognition altogether as well as the ability to exclude the Confidential Employees, it is a better alternative.

b) Petition for representation election (with Confidential Employees)

As noted above, Local 841 has secured enough authorization cards to entitle it to a representation election. At the election, if the union receives the support of at least 1 /2 of the votes cast, it will be certified as the exclusive representative of the employees in the bargaining unit. Local 841 is so far unwilling to agree that the Confidential Employees should be excluded. A number of alternatives are possible in this scenario.

Proceed with Election on Unstipulated Basis

We understand that you are unconvinced that the union would win the election, especially if the Confidential Employees are allowed to vote. If you are correct, the union certification would be defeated, resulting in achievement of all of your goals. However, if the union wins an unstipulated vote, all of the Confidential Employees would be part of the new bargaining unit. Given that this is a "worst case" scenario and in light of the fact that the union has already secured 10 authorization cards, we would recommend against this alternative.

Agree to Election with Challenge as to Confidential Employees

Under this alternative, you would proceed with the certification election and dispute whether the Confidential Employees are part of the bargaining unit. The votes of the Confidential Employees would not be counted unless they could influence the outcome of the election, in which case the Board would then investigate whether the Confidential Employees are eligible to vote or not. Both sides would be given a chance to present evidence. The votes of the Confidential Employees would then be voted only if they are found to form part of the bargaining unit or if you withdraw your challenge.

challenge if you are confident that the votes of the Confidential Employees would defeat the certification vote.

Request Determination of Proper Bargaining Unit

Finally, you could request that the NLRB's Regional Director determine the appropriate bargaining unit for certification prior to the certification vote. As noted above, this would likely result in Mr. Drake and Ms. Street being excluded from the bargaining unit while Ms. Norris would be included.

The consequence of this is that you will be assured of the exclusion of Mr. Drake and Ms. Street from any bargaining unit prior to the certification vote. On the other hand, you will lose the ability to prevent certification altogether if the election would be decided by the votes of Mr. Drake and Ms. Street because they will not be eligible to vote.

Therefore, our initial recommendation is to pursue the certification election with a challenge to the eligibility of Mr. Drake, Ms. Street, and Ms. Norris. If you are certain that they will each vote against certification, you can withdraw your challenge if their votes would determine the election. If not, the challenge can be maintained and Ms. Street and Mr. Drake can still be excluded.

Consent Election

Note that with respect to any of the alternatives above, you can either consent to an election or force a hearing on its necessity. Given the number of authorizations obtained, we recommend forgoing the hearing and agreeing to a consent election.

If Certification Occurs

Finally, if Local 841 is successful in its certification efforts, you should know that your only recourse will be to refuse to bargain with the union. This will ordinarily prompt the union to file an unfair labor practice charge, which could be defended by claiming that the certification was inappropriate with an ultimate review by the U.S. Court of Appeal. Given the cost inherent in such a proceeding and your need to maintain good relations with Local 841, we would recommend against this step unless you deem it absolutely necessary.

We trust that the foregoing is sufficient for the moment. Please do not hesitate to call if you have any questions prior to your meeting tomorrow.

Yours truly,

Applicant

THURSDAY AFTERNOON
MARCH 1, 2001

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

STATE V. SIZEMORE

STATE V. SIZEMORE
INSTRUCTIONS

1. You will have three hours to complete this session of the examination. performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. The Columbia Trial Court is the Superior Court.

3. You will have two sets of materials with which to work: A File and a Library. The File contains factual information about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.

4. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume hat cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit volume and page citations.

5. Your responses must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness and organization of your response.

State's Attorney's Office
County of Marion
10 The Green
Benton, Columbia

Theodore LeBlang
State's Attorney

March 1, 2001

To: Applicant

From: Theodore LeBlang

Re: State v. Sizemore

As you know, this office is prosecuting Jerry Martin Sizemore on a charge of attempted murder. Trial was completed yesterday, and closing arguments were scheduled for this morning. Unfortunately, Bonnie Miller, the Assistant State's Attorney trying the case, has gone into the hospital for an emergency appendectomy. The court has given us an extension of time until tomorrow to present closing arguments. I will present the closing argument, but I want you to prepare a draft of that closing argument for my review.

Please write out the argument exactly as you would give it if you were presenting it. Follow the guidelines contained in the office memo on Closing Arguments/Bench Trials.

State's Attorney's Office
County of Marion
10 The Green
Benton, Columbia

Theodore LeBlang
State's Attorney

February 22, 1994

To: Attorneys

From: Theodore LeBlang

Re: Closing Arguments/Bench Trials

Your closing argument should begin with an understanding of the legal principles that will be applied to the facts in the case. In jury trials, you will have jury instructions. In bench trials, however, you must rely on your analysis of legal authority (statutes and case law) during closing argument. The legal authorities in bench trials (just as the instructions in jury trials) will give you the framework for your closing argument. The argument must show how the evidence admitted during the trial meets the legal standards established by the statutes and case law. While in a jury trial you do not ordinarily discuss or make reference to the legal authorities, in a bench trial you have more latitude in referring to the legal authority. Indeed, in the absence of jury instructions, you may find it necessary to explain to the court finer points of the law. But, you must not lose sight of the fact that a closing argument is not a legal brief or an essay. The argument is based on the evidence presented, not histrionics or personal opinion.

Your job is to help the judge understand how the law relates to the facts presented, and to persuade the judge that he or she has no choice but to find as you have advocated. In doing that, you may want to do some or all of the following:

- State explicitly the ultimate facts that the court must find for you to prevail.
- Explain how the evidence supports the ultimate facts.
- Use relevant legal principles to support your argument.
- Discuss the sufficiency of the evidence and the credibility of the witnesses.
- Draw reasonable inferences from the evidence to support your position.
- Anticipate opposing counsel's arguments and point out weaknesses in his or her case.
- Refer to equities or policy considerations that merit finding for your position.
- Never hold back any argument assuming you will have a second opportunity to make it in rebuttal.

Not all of the items in this list fit every case, but they are things you should at least think about. Organization and persuasiveness are very important. If you immerse the judge in a sea of unconnected details, he or she won't have a coherent point of view.

TRIAL TRANSCRIPT

STATE V. SIZEMORE

EXAMINATION OF B. J. ATWOOD

B.J. Atwood, A witness called by the State, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. MILLER

Q: Would you tell us your name?

A: B. J. Atwood -

Q: Where do you work?

A: I am a Trooper with the State Police.

Q: Were you on duty September 19, 1999?

A: Yes.

Q: Did you investigate a possible hit and run on that date?

A: Yes, it was on September 19, while on patrol, I came upon a red Ford Taurus on Tower Drive.

Q: Did you notice anything unusual about the car?

A: The car had clearly been in an accident and was abandoned. It also matched the description of the car that had been involved in an accident and possible hit and run about two hours earlier.

Q: What did you do?

A: I determined the car belonged to Jerry Martin Sizemore.

Q: Then what happened?

A: I knew Sizemore lived with his parents. I went to their home to interrogate the defendant.

Q: At what time was that?

A: Approximately 4:15 p.m.

Q: Where is the house located?

A: 9873 Pine St., Benton, Columbia.

Q: What happened when you went to the house?

A: I knocked at the door of the Sizemore home, the defendant responded and admitted me into the house.

Q: What happened then?

A: I interviewed the defendant.

Q: Was anyone else present during this interview?

A: The interview started out in the presence of Lloyd Wendell, a friend of Sizemore's.

Q: Did you ask Sizemore about the accident?

A: Yes.

Q: What did he say?

A: Sizemore denied any involvement in the accident and claimed that his car had ~', been stolen earlier in the day and that his sister, Pamela, was supposed to have reported the theft.

Q: Hearing this, what did you do?

A: I asked to speak to Pamela, and Sizemore brought her into the room.

Q: And then?

A: When the young girl came into the room I asked if I could talk to her outside. She said yes, so we went outside.

Q: Where did you go?

A: I took her to my police car.

Q: How long did you talk with Pamela?

A: We talked for about five or ten minutes.

Q: Did you talk about the defendant's car?

A: Yes, and during my conversation in the police car Pamela told me her brother's car had not been stolen.

Q: Did you finish your conversation with Pamela?

A: No.

Q: Why not?
A: While we were talking I heard someone say in a loud tone of voice, "Pam, get out of that car."
Q: What did you do?
A: I looked in the direction the voice came from and saw Sizemore standing in front of the house, approximately 20-25 feet from the police car, with a .22 caliber rifle to his left shoulder, pointed straight at me.
Q: Did he say anything?
A: He said, "I'm going to kill you, cop," and Pam started hollering, "No, Jerry, No, Jerry, No," and he hollered at her and said, "Get out of that car."
Q: Did she leave the car?
A: She jumped out the door and started running. She ran toward Mrs. Combs' house, which is back behind her house and to the right.
Q: Then what happened?
A: The defendant said, "Damn you, I'm going to kill you."
Q: What did you do?
A: I said, "Put your gun down," and he said, "No, I'm going to kill you."
Q: Was he still on the porch?
A: Well, after he said that, he started off the porch and he said, "You move, and I'm going to kill you."
Q: What were you doing as he came off the porch?
A: I had my right hand on the steering wheel and I had my left hand up on the door post. He said, "If you move, I'll kill you. You put your hands up."
Q: What did you do?
A: I just raised them up like this, and then he walked on up to about five feet of the car, and I said, "Put your gun down and let's talk."
Q: What did he say?
A: He said, "No, I'm going to kill you." I said, "If you kill me, you go to the

electric chair."

Q: Was anyone else present when this was going on?

A: About this time, Lloyd Wendell, the other person who was in the house, came out and Sizemore told him - I believe he called Wendell "Buttons" - he said, "Go around and get his gun."

Q: What did Mr. Wendell do?

A: Wendell said, "No, I'm not going to get his gun. I'm not going to get involved in it. I'm not going to spend the rest of my life in the penitentiary." I then told Sizemore again, I said, "Put your gun down. When you shoot me, you don't go to the penitentiary. You go to the electric chair."

Q: What was the defendant's response?

A: He said, "I'm going to kill you," and he told Wendell again, he said, "I told you to get his gun," and Wendell said, "No, I'm not going to get his gun." I told Sizemore, "You had better give Wendell the gun because when you pull that trigger and kill me, that's cold-blooded murder," and I said, "You'll fry in the electric chair for it."

Q: Did he put the gun down?

A: Not right away. I said, "Right now you're just involved in an automobile accident charge." That was the only thing I was investigating, but I said, "You're getting yourself into some serious trouble." I told him again, "When you pull that trigger and you kill me, you'll go to the electric chair," and I told him this two or three different times, and finally he just dropped the gun down and I said, "Give it to your friend," and he handed the gun to Wendell.

Q: Do you know what provoked this confrontation?

A: Well, it was pretty obvious. There was no unpleasantness when we were in the house. It was obviously my request for a private conversation with Sizemore's sister that provoked the defendant and triggered his actions.

BY MS. MILLER: That's all I have, your Honor.

CROSS-EXAMINATION BY MS. JANE

Q: Trooper Atwood, Mr. Sizemore smelled like he had been drinking, didn't he?

A: Yes.

Q: Before Mr. Sizemore gave up the gun, he pointed it down toward the ground, then pushed the safety back on it and handed it to Wendell, correct?

A: Yes.

Q: Wendell then took the gun and ejected the shells out on the ground, is that right?

A: Yes.

Q: Now, after Mr. Sizemore gave the gun to Mr. Wendell, without even getting out of the car, you said to Sizemore, "Come around and have a seat," and he came around and sat down beside you in the patrol car, is that correct?

A: Yes.

Q: You questioned Mr. Sizemore in the car about the accident?

A: Yes.

Q: After talking about the car accident, that's when you arrested him and took him to the Marion County Jail?

A: Yes.

Q: You didn't handcuff Mr. Sizemore did you?

A: No.

BY MS. JANE: Nothing further.

REDIRECT EXAMINATION BY MS. MILLER

Q: Trooper Atwood, did Mr. Sizemore appear drunk?

A: The defendant did not appear to be drunk when he came out of the house. While Sizemore had the odor of alcohol about his person, he answered all questions clearly and intelligently. He never staggered; he walked steadily; the gun he was holding on me never wavered any appreciable amount, and he appeared to be very much in control of himself.

Q: Thank you, Trooper Atwood.

BY MS. MILLER: Your Honor, the prosecution rests, subject to rebuttal.

EXAMINATION OF JERRY SIZEMORE

Jerry Martin Sizemore, a witness called by the Defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JANE

Q: Would you tell us your name?

A: Jerry Martin Sizemore.

Q: Where do you live?

A: 9873 Pine St., Benton, Columbia.

Q: Mr. Sizemore, do you recall your activities on September 19, 1999?

A: Not really.

Q: What do you mean?

A: Well, I don't really remember much other than that I got up in the morning and had been drinking beer and whisky and driving my automobile around.

Q: Do you remember meeting Trooper Atwood that day?

A: No.

Q: Do you remember anything about that day other than drinking beer and whiskey and driving around?

A: I remember waking up in the county jail.

Q: Would it be fair to say you were intoxicated on September 19?

A: Yes.

Q: Have you ever intended to kill Trooper Atwood?

A: Of course not.

Q: No further questions, your Honor.

CROSS-EXAMINATION BY MS. MILLER

Q: Mr. Sizemore, this isn't the first time you have been arrested is it?

A: No.

Q: In fact, isn't it true that you were arrested for shoplifting?

By MS. JANE: Objection, your Honor. Use of an arrest is improper impeachment. Likewise, shoplifting is an act that, even if leading to a conviction, is improper impeachment under Columbia Rules of Evidence 609.

BY MS. MILLER: Your Honor, this is not for the purpose of impeachment. Rather, it is related to 404(b) intent. If you will allow me a few more questions to make the point.

BY THE COURT: Go ahead.

BY MS. MILLER: Isn't it true that you were arrested for shoplifting?

A: Yes.

Q: You went to jail?

A: Yes.

Q: While in jail you were accused of attacking a jail guard?

A: Yes, but that was just Johnny Simms. We'd been friends for years. Besides which, I told people that I didn't throw that fan at Johnny, that fan fell off the shelf.

Q: You were tried and convicted of a felony arising out of that altercation weren't you?

BY MS. JANE: Objection, your Honor. I renew my previous objection and now object to the introduction of the felony conviction. Both are improper impeachment and irrelevant under 404(b).

BY MS. MILLER: Again, your Honor, this is not for the purpose of impeachment. Both the shoplifting arrest and the acts related to the felony conviction are relevant under 404(b). Further, the felony conviction is admissible under 609 and I gave Ms. Jane notice long before the trial that I intended to introduce this evidence.

BY THE COURT: I'll overrule the objection.

BY MS. MILLER: Mr. Sizemore, let me ask again, you were tried and convicted of a felony arising out of that altercation at the county jail, weren't you?

A: Yes.
Q: You were sentenced to a year in jail, weren't you?
A: Yes, but 6 months were suspended.
BY MS. MILLER: Nothing further, your Honor.

EXAMINATION OF LLOYD WENDELL

Lloyd Wendell, a witness called by the Defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JANE

Q: Where did you spend September 19, 1999?
A: Mr. Sizemore and I spent the day together.
Q: What did you do?
A: I went over to his house about 9:30 in the morning. Most of the time we were just hanging out.
Q: Did you ever leave Mr. Sizemore's house?
A: Yeah. About 2:00 we went out to buy some more beer.
Q: Did you use Mr. Sizemore's car?
A: No, we used mine.
Q: Why was that?
A: Jerry said his was stolen, so I drove.
Q: Did you pick up more beer?
A: Yeah.
Q: How much?
A: I think it was two 12 packs.
Q: Had you been drinking before 2:00 p.m.?
A: Yes.
Q: How much?
A: Well, I'd brought over two 12 packs and we finished those. That's why we had to go out to get some more.

Q: Were you present when officer Atwood came to the Sizemore house on September 19, 1999?
A: Yes.
Q: By that time, how much beer had you drunk?
A: We had pretty much gone through a total of three 12 packs.
Q: How much of that had Mr. Sizemore drunk?
A: At least half of it.
Q: When Trooper Atwood arrived at the house, did he ask Sizemore about the accident?
A: Yes.
Q: What did he say?
A: Just that it was stolen, and that Pammy was supposed to have reported the theft.
Q: Did Trooper Atwood ask to speak to Pamela?
A: Yes.
Q: Did he?
A: Yes, out in the patrol car.
Q: Where did you go?
A: I stayed in the house with Jerry.
Q: What happened in the house?
A: Jerry was kind of annoyed that the Trooper had stopped the party and that apparently Pam had not reported the car theft.
Q: Did anything happen?
A: Jerry said, "Let's go have some fun and scare Pammy."
Q: Then what happened?
A: Jerry took his .22 rifle off the rack and went out front.
Q: Did he say anything?
A: He said, "I'm going to kill you."

Q: When he said "you" who did he mean?
BY MS. MILLER: Objection. Calls for speculation.
BY THE COURT: Overruled.
BY MS. JANE: You can answer.
A: Well, it was clear from what he said about scaring Pam, he meant Pam. But it was just to scare her.
Q: Did Pam do anything?
A: She starts yelling, "No, Jerry, no, Jerry, no, please." Then she jumps out of the car and runs over to the neighbor's.
Q: Then what happened?
A: The policeman says, like, "Put the gun down and let's talk."
Q: What did Mr. Sizemore do?
A: He handed me the gun and then went into the patrol car with the policeman.
BY MS. JANE: That's all I have your Honor.

CROSS-EXAMINATION BY MS. MILLER

Q: Isn't it true that Mr. Sizemore asked you to get Trooper Atwood's gun?
A: No.
Q: In response to Mr. Sizemore's request, you said, quote, "No, I'm not going to get his gun. I'm not going to get involved with it. I'm not going to spend the rest of my life in the penitentiary."
A: No.
Q: After Pamela left the car, Mr. Sizemore said to Trooper Atwood, quote, "I'm going to kill you."
A: No.
Q: Trooper Atwood told Mr. Sizemore, "You had better give Wendell the gun because when you pull the trigger and kill me, that's cold-blooded murder."
A: No.
Q: Let's try this, then. You've been a friend of Jerry Sizemore for a long time

haven't you?

A: Since high school.

Q: That would be what, 7 or 8 years?

A: About that.

Q: You hang out together?

A: Yes.

Q: Drink together?

A: Some.

Q: Actually, you were arrested once together, weren't you?

BY MS. JANE: Objection.

BY THE COURT: Overruled.

Q: You've been convicted of a felony yourself, haven't you?

A: Yes.

Q: That was two years ago?

A: I think that's right.

Q: The conviction was for assault and battery, is that right?

A: I believe that's what they called it.

BY MS. MILLER: No further questions.

EXAMINATION OF HAROLD SHARP

Harold Sharp, a witness called by the Defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JANE

Q: Would you tell us your name and occupation, please.

A: Dr. Harold Sharp. I am a physician at Marion Community Hospital.

Q: Are you licensed to practice medicine in this state?

A: Yes.

BY MS. JANE: Your Honor, rather than prolong this, I ask the court to recognize Dr. Sharp as an expert on the effect of alcohol on the human body.

BY MS. MILLER: Your Honor, I have no objection to Dr. Sharp's qualifications to testify about the effect of alcohol, but do object to the relevancy of this testimony.

BY THE COURT: I'll accept the agreement that Dr. Sharp is an expert. Ms. Jane, will the doctor's testimony be lengthy?

BY MS. JANE: Just a couple of questions, your Honor.

BY THE COURT: I'm going to allow it. Ms. Miller, this is a bench trial. You can make your relevancy point on closing, if you like.

BY MS. MILLER: Thank you, your Honor.

BY MS. JANE: Now Dr. Sharp. Let me ask you, imagine a 26 year old man, who is 5 feet 10 inches tall and weighs 160 pounds. Assume that man consumes 18 cans of beer over a period of 6 hours. Each can of beer contains 12 ounces. Do you have an opinion to within a reasonable degree of medical certainty whether that person would have a blood alcohol content in excess of .01 ?

A: The individual would be lucky to be able to stand. The alcohol content would be far in excess of .01 .

Q: Would it be conceivable that that person would have a diminished capacity to function?

A: Yes.

Q: Would the person be unable to recall what occurred during that 6 hour period?

A: Most certainly.

Q: Thank you doctor.

CROSS-EXAMINATION BY MS. MILLER

Q: Dr. Sharp, you've never examined the defendant Jerry Sizemore did you?

A: No.

Q: You've never met Mr. Sizemore, have you?

A: No.

Q: Thank you, doctor. I have no further questions, your Honor.

BY MS. JANE: Your Honor, the defense rests.

BY MS. MILLER: Your Honor, the prosecution has no rebuttal witnesses. We rest.

BY THE COURT: Thank you. Given the late hour, I think we will recess until tomorrow at 9:30 a.m. At that point, I will hear closing arguments. Good afternoon.

THURSDAY AFTERNOON
MARCH 1, 2001

California Bar Examination

Performance Test B

LIBRARY

STATE V. SIZEMORE

LIBRARY

COLUMBIA PENAL CODE

§ 128. Criminal attempt

a. Definition of attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(1) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be;

(2) Does or omits to do anything with the purpose of causing a particular result without further conduct on his part, when causing a particular result is an element of the crime; or,

(3) Purposely does or omits to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

b. *Conduct which may be held substantial step under subsection a. (3).* Conduct shall not be held to constitute a substantial step under subsection a.(3) of this section unless it is strongly corroborative of the actor's criminal purpose.

* * *

d. *Renunciation of criminal purpose.* When the actor's conduct would otherwise constitute an attempt under subsection a. (2) or (3) of this section, it is an affirmative defense which he must prove by a preponderance of the evidence that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Within the meaning of this chapter, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of

the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose.

§ 135. General requirements of culpability

a. *Minimum requirements of* culpability. Except as provided in subsection c. of this section, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

b. *Kinds of* culpability *defined.*

(1) Purposely. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.

(2) Knowingly. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.*3) Recklessly. A* person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Recklessness," "with recklessness" or equivalent terms have the same meaning.

(4) Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. "Negligently" or "negligence" when used in this code shall refer to the standard set forth in this section and not to the standards applied in civil cases.

c. Construction of statutes with respect to culpability requirements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

d. *Culpability as to illegality of conduct.* Neither knowledge nor recklessness nor negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element

of such offense, unless the definition of the offense or the code so provides.

§ 140. Murder

a. Criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death.

* * *

§ 148. Intoxication

a. Except as provided in subsection d. of this section, intoxication of the actor is not a defense unless it negates an element of the offense.

b. When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

c. Intoxication does not, in itself, constitute mental disease.

d. Intoxication which is not self-induced or is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial and adequate capacity either to appreciate its wrongfulness or to conform his conduct to the requirement of law.

e. *Definitions.* In this section, unless a different meaning plainly is required,

(1) "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;

(2) "Self-induced intoxication" means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which he knows or thought

to know causes intoxication, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;

(3) "Pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.

COLUMBIA RULES OF EVIDENCE

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.

* * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 609. Impeachment by Evidence of Conviction of Crime.

(a) General rule. For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, unless unduly prejudicial, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be

admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

State v. Smith

Supreme Court of Columbia (1980)

This is an appeal from a judgment directing a verdict in favor of the defendant, Richard Keith Smith (Smith), at the close of the State's evidence upon the charge of attempted murder. We reverse.

On the evening of August 10, 1979, Smith and his uncle, Melvin Howell, were heavily engaged in a drinking bout. They fell to quarreling. Smith stabbed his uncle in the chest twice and pursued him up the street shouting unintelligible epithets at his uncle as they ran.

The uncle collapsed from weakness a block away, and, when Smith approached, his mood had changed. He was remorseful and wept. Smith then dragged his uncle into the uncle's car, threw away the knife, and sped up Pearl Street, to Floyd Memorial Hospital.

Examination by physicians at the hospital revealed that Uncle Melvin had suffered two deep stab wounds between his ribs and close to his heart which had penetrated and collapsed both lungs. Uncle Melvin survived, and Smith was charged with attempted murder.

After the State had rested its case-in-chief, the trial court granted Smith's motion for a directed verdict on the basis of abandonment. The sole question on appeal is whether the trial court erred in ruling that Smith had abandoned the crime of attempted murder after he had inflicted serious knife wounds upon his intended victim.

The thrust of Smith's argument, and the theory relied upon by the trial court, is that after the stabbing, and after the uncle had collapsed and was at Smith's mercy, Smith abandoned the effort to commit the underlying offense of murder and voluntarily prevented its commission.

The State argues that the defense of abandonment is not available in a case of attempted murder where the defendant's attempt has resulted in the wounding of the intended victim. In such case, the effort to commit the underlying crime has been completed and cannot be abandoned.

Columbia Penal Code § 128(d) is a codification of existing law as announced in *Hedrick v. State, (1951).* Hedrick involved a group of participants. The court essentially said that where one has aided and encouraged the commission of a offense, he may, nevertheless, before completion of the offense, withdraw all his aid and encouragement and escape criminal liability for the completed offense. To constitute abandonment, there must be some appreciable interval between the alleged abandonment and the act. The defendant must have effectively detached himself from the criminal enterprise before the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed. The process of detachment must be such that it will not only show a determination upon the part of the accused to go no further, but also give his co-conspirators a reasonable opportunity, if they desire, to follow his example and refrain from further action before the act in question is committed. In order for the defendant to validly assert the defense of abandonment, it must be shown that his renunciation of the criminal plan occurred both voluntarily and prior to the time when the criminal act was completed.

It is clear that attempted murder cannot be purged after the victim has been wounded, no matter what may cause the plan to be abandoned. And probably the same is true after a shot has been fired with intent to kill.

On the other hand, although a criminal plan has proceeded far enough to support a conviction of criminal attempt, it would be sound to recognize the possibility of a locus penitentiae so long as no substantial harm has been done and no act of actual danger committed. This is so when the attempt to commit a crime is freely and voluntarily abandoned before the act is put in process of final execution and where there is no outside cause prompting such abandonment.

Assuming a defense of voluntary abandonment, does there come a point at which it is too late for the defendant to withdraw? Obviously there must be, for it would hardly do to excuse the defendant from attempted murder after he had wounded the intended victim or, indeed, after he had fired and missed. It might even be argued that it is too late whenever the defendant has taken the last proximate step, e.g., when the accused has pointed the gun at his victim with apparent intent to pull the trigger, for at that point his dangerousness is not rebutted by the withdrawal.

On the other hand, the discussion of the Model Penal Code commentators bears scrutiny:

> On balance, it is concluded that renunciation of criminal purpose should be a defense to a criminal attempt charge because, as to the early stages of an attempt, it significantly negates dangerousness of character, and, as to later stages, the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort. And, because of the importance of

encouraging desistance in the final stages of the attempt, the defense is allowed even where the last proximate act has occurred but the criminal result can be avoided, e.g., where the fuse has been lit but can still be stamped out. If, however, the actor has gone so far that he has put in motion forces which he is powerless to stop, then the attempt has been completed and cannot be abandoned. In accord with existing law, the actor can gain no immunity for this completed effort (e.g., firing at the intended victim and missing); all he can do is desist from making a second attempt.

In any event, abandonment must occur before the crime is completed or the harm is done. In this case the offense charged was attempted murder, which is completed when, acting with the culpability required for commission of the crime, the perpetrator engages in conduct that constitutes a substantial step toward the commission of the crime.

The offense here was completed with the first thrust of Smith's knife. This was followed by a second stabbing and further pursuit of the uncle with the knife. Two attempts were completed and Smith abandoned the third attempt. Remorse, common to many who are imprisoned for crime, is not abandonment. Here, abandonment came too late.

The trial court erred in entering a judgment for the defendant at the close of the State's case-in-chief. Accordingly, we reverse.

People v. Johnson
Supreme Court of Columbia (1987)

Defendant, Floyd M. Johnson, appeals the judgment of conviction entered following a jury verdict of guilty of attempted murder. He contends that the evidence was insufficient to sustain a verdict of guilty and that the trial court erred in denying his tendered instruction on the affirmative defense of abandonment or renunciation. We reverse.

The evidence established that, following a fight with a friend outside a bar where the two had been drinking, defendant walked a mile to his house, retrieved his .22 rifle and ten cartridges, walked back to the bar, and crawled under a pickup truck across the street to wait for the friend. Defendant testified that he, at first, intended to shoot the friend to "pay him back" for the beating he had received in their earlier altercation.

The police were alerted by a passerby and arrested defendant before his friend emerged from the bar. Defendant testified that, while he was lying under the pickup truck, he sobered up somewhat and began to think through his predicament. He testified that he changed his mind and removed the shells from the rifle, placing them in his pocket. By that time two persons had approached the pickup truck, and defendant began a discussion with them, telling them his name and address and inviting them to his residence to have a party. The three of them were still there drinking and conversing when the police arrived, at which time the rifle was found to be unloaded and the shells in defendant's pocket.

Defendant contends that while his intent may have been to shoot his friend, no

evidence was presented to show that his intent was to cause the friend's death. Absent a showing of intent to kill, he argues, the evidence is insufficient to sustain a conviction of attempted murder. Based on the facts presented, we disagree.

In ruling on defendant's motion for judgment of acquittal at the close of the prosecution's case, the trial court correctly applied the standard set out in *People v. Bennett, (1973).* Viewing the evidence in the light most favorable to the prosecution, the court concluded that the defendant's possession of a working rifle and live ammunition and his statements that he intended to shoot the victim were sufficient to submit the case to the jury. We find no error in the trial court's denial of this motion.

Defendant also contends that the trial court erred when it refused his tendered instruction on the affirmative defense of abandonment or renunciation. We agree.

In general, an instruction on defendant's theory of the case must be given if there is any evidence in the record to support it. Under the circumstances in this case, there was sufficient evidence to warrant an instruction on the affirmative defense of abandonment or renunciation. Had the tendered instruction been given and the defendant's testimony and other evidence been accepted by the jury, the outcome of this trial could well have been otherwise. The judgment is reversed.

State v. Cameron
Supreme Court of Columbia (1986)

The appeal presents a narrow, but important, issue concerning the role that a defendant's voluntary intoxication plays in a criminal prosecution. The Court of Appeal reversed defendant's convictions. We now reverse the Court of Appeal.

Defendant, Michele Cameron, age 22 at the time of trial, was indicted for aggravated assault and possession of 2 weapon, a broken bottle, with a purpose to use it unlawfully, and resisting arrest. A jury convicted defendant of all charges.

The charges arose out of an incident of June 6, 1981 on a vacant lot in Trenton. The victim, Joseph McKinney, was playing cards with four other men. Defendant approached and disrupted the game and attacked McKinney with a broken bottle.

The appellate court reversed the conviction on the ground that voluntary intoxication is a defense when it negates an essential element of the offense - here, purposeful conduct. We agree with that proposition. Likewise are we in accord with the determinations of the court below that all three of the charges of which this defendant was convicted - aggravated assault, the possession offense, and resisting arrest - have purposeful conduct as an element of the offense and that a person acts purposely "with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result" (quoting Columbia Penal Code § 135 (b) (1)). We part company with the Court of Appeal, however, in its conclusion that the circumstances disclosed by the evidence 'in this case required that the issue of defendant's intoxication be submitted to the jury.

Under the Columbia Penal Code, self-induced intoxication is not a defense unless it negates an element of the offense. See § 148(a). The Code permits evidence of intoxication as a defense to crimes requiring either "purposeful" or "knowing" mental states, but it excludes evidence of intoxication as a defense to crimes requiring mental states of only recklessness or negligence. Intoxication is admissible to disprove the culpability factors of purpose or knowledge, but for crimes requiring only recklessness or negligence, exculpation based on intoxication should be excluded as a matter of law.

Under the Code, proof of voluntary intoxication would negate the culpability elements in the offenses of which this defendant was convicted. The charges -aggravated assault, possession of a weapon with a purpose to use it unlawfully, and resisting arrest - all require purposeful conduct (aggravated assault uses "purposely" or "knowingly" in the alternative). The question is what level of intoxication must be demonstrated before a trial court is required to submit the issue to a jury. What quantum of proof is required?

The mere intake of even large quantities of alcohol will not suffice. Moreover, the defense cannot be established solely by showing that the defendant might not have committed the offense had she been sober. The Code's definition of intoxication is "a disturbance of mental or physical capacities resulting from the introduction of substances into the body." Columbia Penal Code § 148(e)(1). This is often interpreted as showing such a great prostration of the faculties that the requisite mental state was totally lacking. Such a state of affairs will likely exist in very few cases.

In general, the factors that should be used include: the quantity of intoxicant

consumed, the period of time involved, the actor's conduct as perceived by others (what he said, how he said it, how he appeared, how he acted, how his coordination or lack thereof manifested itself), any odor of alcohol or other intoxicating substance, the results of any tests to determine blood-alcohol content, and the actor's ability to recall significant events. Cases in which evidence of intoxication was deemed sufficient to present a jury question include *State v. Frank/and,* (1968)(defendant consumed fifteen drinks of scotch and water and could not remember the events of the evening); and *State v.* Polk, (1977)(defendant drank beer and wine from 9 a.m. until sometime in the afternoon; drinking companion had blood-alcohol concentration of 0.158; defendant acted irrationally, hitting baby with his fist and throwing baby down onto a porch). Cases holding that the evidence was insufficient to warrant a jury charge on intoxication are *State v. Selby,* (1981)(defendant shared with three others a marijuana pipe for about ten minutes, as a result of which he felt "high" and "pretty good"); *State v. Kinlaw,* (1977) (defendant drank beer between 11 a.m. and 2 p.m. and described himself as "drunk") and *State v. Ghaul,* (1975)(defendant testified he had been "drinking all day").

Measured by the foregoing standard and evidence relevant thereto, it is apparent that the record in this case is insufficient to have required the trial court to grant defendant's request to submit the issue of intoxication to the jury. True, the victim testified that defendant was drunk, and defendant herself said she felt "pretty intoxicated," "pretty bad," and "very intoxicated." But these are no more than conclusory labels, of little assistance in determining whether any drinking produced a prostration of faculties. Defendant's conduct was violent, abusive, and threatening.

But with it all there is not the slightest suggestion that she did not know what she was doing or that her faculties were so beclouded she was incapable of engaging in purposeful conduct. That the purpose of the conduct may have been bizarre, even violent, is not the test. The critical question is whether defendant was capable of forming that bizarre or violent purpose, arid we do not find sufficient evidence to permit a jury to say she was not so capable.

Reversed.

ANSWER 1 TO PERFORMANCE TEST B

State v. Sizemore

Closing Argument

Introduction

Your Honor, the State has presented evidence in this trial establishing that the defendant, Jerry Martin Sizemore, is guilty of the attempted murder of State Trooper B. J. Atwood. The evidence in this case has established that on September 19, 1999, while Officer Atwood was present at the defendant's house in the course of his official duties on behalf of the state, the defendant pointed a loaded .22 caliber rifle at Officer Atwood and threatened to kill him. The evidence on these points is undisputed and had been admitted by defendant's own witnesses. Furthermore, as Officer Atwood testified, Defendant made his intention to kill Officer clear by repeating his death threat not once, but five more times. Significantly, all of these death threats came while the defendant had the loaded rifle aimed at Officer Atwood. Finally, the evidence has established that Officer Atwood did a superior job of remaining calm under the stress of these death threats and was able to defuse the situation and prevent his own murder.

Significantly, Your Honor, defense counsel has failed to present any evidence that effectively negates any element of Defendant's attempted murder of Officer Atwood. Instead, as our review of the evidence established at this trial will show, Defendant's conduct satisfied the elements of the crime of attempted murder under the Columbia Penal Code and this court should find the defendant guilty of the attempted murder of Officer Atwood.

Elements of Attempted Murder

As stated succinctly in the 1980 Supreme Court of Columbia case State v. Smith, attempted murder under the Columbia Penal Code occurs where, "when acting with the culpability required for commission of the crime, the perpetrator engages in conduct that constitutes a substantial step toward the commission of the crime."

Section 140 of the Code defends the culpability required for homicide to be present where the actor "purposely causes death or serious bodily injury resulting in death" or "knowingly causes death or serious bodily injury resulting in death." Therefore, under Columbia Law a defendant is guilty of attempted murder where he acts with purposeful or knowing intent to cause serious bodily injury resulting in death and takes a substantial step toward the commission of the crime.

Purposeful or Knowing Mental State

Thus to find for the State in this case, Your Honor must find that Defendant acted with the requisite purposeful or knowing mental state. Here, Your Honor, there is no dispute that Defendant pointed a loaded rifle at Officer Atwood on the morning of September 19, and threatened to kill him. Indeed, according to Officer Atwood, who has no motivation to do anything but tell the truth, Defendant threatened to kill him six times while pointing the loaded rifle at him.

This evidence alone provides enough evidence for Your Honor, in her role as fact finder in this case, to find the requisite intent. I would just briefly remind the Court of People v. Johnson, where in 1987 the Supreme Court of this state held that "defendant's possession of a working rifle and live ammunition and his statements that he intended to shoot the victim were sufficient to submit the case to the jury." (Mental State) While Your Honor could reasonably find for the state on these facts alone, you do not have to. Here, the record is also replete with additional factors which evidence Defendant's intent to actually shoot Officer Atwood.

Officer Atwood testified that he was at Defendant's house that morning because, while he was investigating a hit-and-run, he found Defendant's car abandoned. Further, Officer Atwood testified that Defendant's car matched the description of the car that had been involved in an accident and possible hit-and-run earlier in the day.

Thus, Your Honor, it is clear that the defendant knew why Officer Atwood appeared at his door that day; he was there to investigate yet another crime committed by the Defendant. As Defendant's own testimony established, he had previously been arrested for shoplifting, which led to him being lodged in jail, and was involved with an altercation with a guard that led to a felony conviction. Further, as Defendant testified, he was sentenced to a year in jail, six months of which were suspended. This evidence is highly relevant, Your Honor, of Mr. Sizemore's motive for attempting to kill Officer Atwood that morning. The evidence indicates that he had been to jail previously, and it is reasonable to infer that he knew he potentially faced more jail time because of the accident involving his car. It is also reasonable to infer that Defendant was afraid that the suspended portion of his sentence would be revoked if he was arrested again, leading to at least another six months in jail.

Atwood that the car had not been stolen. Under the circumstances it is reasonable to infer that Defendant knew and suspected that his sister wouldn't lie for him.

It is in this factual setting that Defendant decided to act. Faced with a sister who wouldn't cover for him, and the potential for more jail time, including the reinstatement of his six-month suspended sentence, the evidence indicates Defendant took action. He picked up his loaded rifle, walked out onto his porch, leveled it at Officer Atwood and threatened to kill him, saying, "I'm going to kill you, cop." Clearly, Your Honor, his own sister believed he was serious, as the evidence shows she hollered at him, "No, Jerry, No, Jerry, No." The defendant then ordered her out of the car, out of harm's way, and after she was gone, told Officer Atwood again, "I'm going to kill you." Then he started off the porch and told Officer Atwood, "You move and I'm going to kill you."

From this detailed factual record, Your Honor, Defendant's motivation for his act is clear, and equally clear is that he possessed the requisite mental state. Defendant Sizemore was acting with the purposeful or knowing mental state as he stepped off the porch, while threatening to kill Officer Atwood. His conduct satisfies the first element of the crime of attempted murder.

Testimony of Lloyd Wendell

I must mention also, Your Honor, that any attempt by the defense in this case to rely on the testimony of Lloyd Wendell to negate the defendant's mental state does not merit the court's consideration. Mr. Lloyd, a convicted felon and close friend of the defendant, admits that at a minimum the defendant grabbed a loaded rifle and said, "I will kill you." Lloyd's testimony that he believed the defendant indicated his intention simply to scare his sister is simply not credible. Equally untrustworthy is his claim that the defendant made one threat and then handed Lloyd the gun at Officer Atwood's first request. This testimony directly conflicts with the testimony of Officer Atwood regarding the event. The state believes that it is clear that Mr. Wendell's testimony was inaccurate and motivated by a desire to help his close friend avoid jail time, the unpleasantness of which something Mr. Wendell has experienced firsthand. Officer Atwood, on the other hand, is a completely credible witness with no motivation to lie; and his credibility had not even been questioned by the defense.

Defense's Claim of Voluntary Intoxication

Defense counsel may also attempt to argue to this court that the requisite mental state as an element of this crime was not satisfied because Defendant claims to have been drunk at the time he pointed the loaded gun at Officer Atwood. This argument is without merit.

It is true that under Code voluntary intoxication can, in very limited circumstances, negate the element of purposeful or knowing conduct. However, the evidence here clearly indicates that such a defense does not apply to the conduct and condition of the defendant.

Under Section 148(e)(1) of the Code, intoxication is defined as "a disturbance of mental or physical capacities resulting from the introduction of substances into the body." Here, the facts indicate that Defendant had ingested some amount of alcohol during the day. But in this state, drinking some whiskey and a couple of beers does not relieve you from the liability for attempted murder. As the Columbia Supreme Court stated in State v. Cameron, this defense has been interpreted to require a showing of "great prostration of the faculties" and "that the mental state was totally lacking."

The record evidence here shows that at the time Mr. Sizemore made the decision to hold Officer Atwood at gunpoint he was answering all of the officer's questions clearly and intelligently. Officer Atwood testified that the defendant never staggered, that he walked steadily, and that the gun he was holding on the officer never wavered any appreciable amount. In the professional opinion of the officer the defendant "appeared to be very much in control of himself."

Under these facts, and applying the factors for considering intoxication from Cameron, it is clear that Defendant's conduct did not meet the "great prostration of faculties" that the court in Cameron emphasized would "exist in very few cases." A review of the relevant case law applying those factors also strongly supports the State's position. I would particularly address the Court's attention to State v. Kinlaw, where the court respectively denied application of the intoxication defense based solely on a defendant's claim that he had been drinking all day and described himself as drunk.

The case law makes it clear that evidence of alcohol consumption without some other corroborating testimony as to intoxication is insufficient to even reach a jury on this issue. Defense counsel will be unable to cite a case to this court where a defendant's own claims of drunkenness, without more, supported a finding of intoxication.

Further, the hypothetical testimony of the defense counsel's witness, Harold Sharp, is inadequate to establish that Mr. Sizemore was intoxicated on the day of this event. In fact, Your Honor, my colleague objected to the relevancy of this testimony at the outset because Dr. Sharp's general characterizations of the effect of alcohol on the human body clearly do not assist the court in determining Mr. Sizemore's level of intoxication on that day. Specifically, Your Honor, defense counsel asked Dr. Sharp his opinion about the effect of a certain amount of alcohol on a 26 year-old man, who is 5 feet 10 inches tall and weighs 160 pounds, over a given period of time. Dr. Sharp then gave his opinion on those hypothetical facts. However, defense counsel at no time

introduced any evidence into the record to establish that Dr. Sharp's hypothetical bears any resemblance to the defendant. In the absence of that evidence it would be improper for the court to even consider his testimony, let alone give it any weight. Further, Your Honor, we would argue that any valid expert testimony considering the effect of alcohol on Mr. Sizemore would have to take into account his specific drinking history and tolerance of alcohol.

For these reasons, Your Honor, the State contends that any attempt by defense counsel to suggest that Defendant's consumption of alcohol on the day in question negates his liability for attempted murder must fail.

Second Element: Substantial Step

In order to find the defendant guilty of attempted murder under the Code, Your Honor must also find, in addition to the requisite mental state, that Defendant took a substantial step toward the commission of the crime. Specifically, Section 128(a)(3) states that Defendant must be found to have done anything that a "reasonable person" would believe to be "a substantial step in a course of conduct planned to culminate in his commission of the crime." Further, the Code requires that the evidence must be strongly corroborative of the actor's criminal purpose.

The record evidence here, Your Honor, is overflowing with substantial steps toward the commission of the crime. In fact, the evidence indicates that the defendant took every step necessary to murder Officer Atwood except pull the trigger. As the evidence in this trial indicated, Defendant grabbed a loaded rifle, aimed it at Officer Atwood while threatening to kill him, took steps towards Officer Atwood, and continued to threaten to kill him while holding him at gunpoint with the loaded rifle.

The evidence clearly satisfies the requirements of the Code, and on these facts a reasonable person could clearly find that Defendant took a substantial step towards the culmination of the crime. The second element of the crime of attempted murder is met by the record evidence of this case, and the court should find Defendant guilty of the attempted murder of Officer Atwood.

Defense of Abandonment

I would like to briefly address one final matter with Your Honor's indulgence. Defense counsel in this matter may argue that Defendant abandoned his attempt and is therefore not guilty of attempted murder. Such a claim is without merit on the facts of this case.

The affirmative defense of abandonment is recognized by Section 128(d) of the Code which requires Defendant to "prove by a preponderance of the evidence that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." The only fact on record in this case by which defense might assert abandonment is that Defendant eventually lowered the gun without murdering Officer Atwood. Under the law of this state that is a fundamentally defective argument.

First, in State v. Smith, the Supreme Court of this state held that "to constitute abandonment there must be some appreciable interval between the alleged abandonment and the act." Here, no such interval existed. Defendant was prevented from completing the act by the persuasive and heroic actions of Officer Atwood, as he was in the midst of the act. The facts do not indicate that Defendant reflected on his crime over a period of time and decided to abandon the murder.

While I do not want to belabor the point, I will suggest to the court that any attempt by defense to rely on the policy arguments discussed in Smith regarding a permissive view towards the defense of abandonment in order to encourage desistance are equally invalid here. Under the record evidence in this case, Plaintiff did not decide on his own to desist from the murder, but was talked out of the murder by a police officer of the state, his potential victim. This is clearly not the type of abandonment that the policy discussion in Smith contemplated.

Even if Renunciation Occurred it was Not Voluntary

Finally, Your Honor, an independent ground for rejecting the defense of abandonment is applicable here. Section 128(d) states that the renunciation must be voluntary, and that it is not voluntary "if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the crime."

While the state remains adamant that no renunciation occurred here, the state suggests that if the court does find a renunciation, that the facts indicate that renunciation was not voluntary and therefore does not qualify as an abandonment under the Code. Instead the facts indicate that after asking Wendell to come outside and assist him, Defendant was subsequently faced with Lloyd's refusal to take away Officer Atwood's gun. Therefore, because his friend would not take away the officer's gun, the defendant's chances of apprehension were increased and the crime became more difficult to accomplish. Thus, Defendant's acts were not within the definition of abandonment, even to the extent that a renunciation took place.

Under these facts defense counsel clearly has not met the burden to establish the affirmative defense of abandonment.

The State has proven its case, Your Honor. The elements of attempted murder have been satisfied, and Mr. Sizemore is guilty of the attempted murder of Officer Atwood.

ANSWER 2 TO PERFORMANCE TEST B

State v. Sizemore

Prosecution's Closing Arguments

Your Honor, we ask that this court finds that the defendant, Sizemore, committed the attempted murder of Trooper Atwood.

The elements of murder are: (1) purposely or knowingly, (2) causing death or serious bodily injury resulting in death; Columbia Penal Code (Code) § 140(a).

The elements of an attempt are either:

(1) purposely engaging in conduct which would constitute the crime;

(2) doing or omitting to do something with the purpose of causing a particular result where causing that result is an element of the crime; or

(3) doing or omitting to do something, purposely, which a reasonable person would believe to be conduct constituting a substantial step in the course of conduct planned to culminate in the commission of the crime: Code § 128(a).

Since the crime charged is attempted murder, the second element of a crime of murder, the causing of the death, is not relevant here. Rather, the State must establish that Sizemore purposely engaged in conduct with the purpose of causing a particular result, namely, the death of Trooper Atwood, or that a reasonable person would believe to constitute a substantial step in a course of conduct planned to culminate in the commission of the crime, namely, murder. We will take the second element first.

Conduct/Substantial Step

It is not disputed by the defense that Sizemore pointed a gun in the direction of Trooper Atwood's car while Atwood was inside the car, and uttered the words, "I'm going to kill you."

It is also not disputed that the safety was off the gun and that it was loaded with ammunition.

These acts, taken together, establish the element of conduct that a reasonable person would believe to constitute a substantial step.

In People v. Johnson, the court found that the defendant's possession of a working rifle and live ammunition and his statements that he intended to shoot the victim were sufficient to submit a case of attempted murder to the jury.

Here, Atwood and Wendell both testified that Sizemore pointed his loaded gun at Atwood and uttered that phrase. Wendell claims they were meant for Pam; however, Atwood's unimpeached testimony shows that even after Pam left the car he continued pointing the gun at Atwood and repeated his intention to kill Atwood. He also offered a motive, the same motive Wendell corroborates, that he was angry about Atwood wanting to talk to Pam concerning the hit-and-run accident. Wendell claims he was angry at Pam, but the fact that he pointed the gun at Atwood even after Pam fled the car corroborates Atwood's testimony.

Finally, Atwood, as a law enforcement officer, had no motive to lie. Wendell, however, as Sizemore's friend, did, and his prior conviction for a felony would, under Columbia Rules of Evidence Rule 609(a), be sufficient to impeach his credibility, and it has.

Purposely/Knowingly

§ 135(b)(1) defines "purposely" as conduct which is the result of a conscious object to engage in conduct of that nature or to cause such a result.

§ 135(b)(2) defines "knowingly" as where the actor is aware of the nature of his conduct or the attendant circumstances exist, or he is aware of a high probability of their existence. The section goes further to say that "a person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result."

§ 135(c) further provides that where the law defining an offense prescribes the kind of culpability without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

Therefore, to be guilty of attempted murder, Sizemore must have purposely or knowingly committed each element of the offense of attempted murder.

Atwood testified that Sizemore pointed a loaded gun at him, with safety off, and uttered the words, "I'm going to kill you, cop." Atwood stated he uttered that phrase five times, the last four times after Pam fled the car.

Wendell testified for the defense that Sizemore pointed the gun and uttered the same phrase, omitting the word "cop," once. However, everything else is as Atwood testified. As I mentioned before, Wendell is a convicted felon, while Atwood is an officer of the law. He went to Sizemore's house on police business. He would have no reason to fabricate this evidence, whereas Wendell would want to protect his friend.

Even if the court finds that Wendell's prior conviction is not sufficient to impeach his testimony, by his own admission, he had had a lot to drink that day. He claims to have drunk as much as Sizemore and the result is Sizemore was incapacitated. Yet he remembered events with clarity. Wendell probably was drunk and his ability to remember the events must be questionable. Atwood, however, was on duty and his capacity was not diminished in any way.

Finally, we have Sizemore's own admission of a prior conviction for attacking a jail guard while serving a sentence for yet another prior conviction. Under Evidence Rule 4041b), the prior attack on an officer of the law may be used to prove intent, knowledge, motive or absence of mistake or accident under the so called "Mimic" doctrine. Sizemore intended in that prior conviction to attack a prison guard, and here Atwood has testified he attacked him, a state trooper. Sizemore was not mistaken, nor pretending in order to scare Pam; he intended to murder Atwood because he was upset about Atwood's discovering that he had lied about his car being stolen when Atwood interviewed Pam.

Sizemore's prior conviction, Wendell's bias and possible questionable capacity, and Atwood's unimpeached testimony therefore establish, beyond a reasonable doubt, that Sizemore intended to murder Atwood, and that he purposely and knowingly pointed a loaded gun, with the safety catch off, at Atwood, in a substantial step to further that purpose.

Defense will argue he never intended to kill Atwood, but to scare Pam. The evidence clearly supports Atwood's account that even after Pam left the car, Sizemore continued to point the gun at Atwood and uttered that phrase several more times. As Wendell agrees, Sizemore was angry about Atwood's questioning. He claims Sizemore was angry at Pam. However, he lied about Pam going to report the car stolen. If he was angry, it was because he would be caught in that lie and get in trouble for the hit-and-run. To prevent that, scaring Pam would not have helped; rather, he intended to kill Atwood to avoid being charged for the hit-and-run.

<u>Defense of Abandonment/Renunciation</u>

The defense may argue that by handing the gun to Wendell, Sizemore abandoned his effort to commit the crime, such that the offense of attempt was not completed.

§ 128(d) of the Code defines a renunciation, which is an affirmative defense which the defense must prove by a preponderance of the evidence, as an abandonment of his effort to commit a crime or otherwise to prevent its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. Renunciation is not voluntary if it is motivated by circumstances which increase the probability of detection or apprehension or which make the accomplishment of the criminal purpose more difficult.

Here, Sizemore put the gun down after Atwood repeatedly warned him that if he shot Atwood it would be a premeditated killing, for which the death penalty could be imposed.

In State v. Smith, the defendant there, on a charge of attempted murder, claimed to have abandoned his crime after feeling remorse upon stabbing his victim. The court held there that abandonment must occur before the crime is completed or the harm is done for the defense of renunciation to operate. In an attempted murder case, the court said, the crime is complete when, acting with the culpability required for the commission of the crime, the perpetrator engages in conduct that constitutes a substantial step towards the commission of the crime, and, further down, that remorse is not abandonment.

Here, the substantial step is the pointing of a loaded gun at Atwood. Having taken that step, the offense of attempted murder was complete. Had he pulled the trigger, he would have killed Atwood, who was only 20 to 25 feet away, and it would have been murder.

Further, Atwood's testimony establishes Sizemore did not even feel remorse. He only put his gun down because he wanted Wendell's assistance, which Wendell refused. Wendell indicated his reason for not wanting to be involved was that he did not want to be subjected to life imprisonment. As a convicted felon he would certainly be likely to attract such a penalty if convicted of aiding in a murder. Atwood further convinced him that being involved in a hit-and-run was not as serious as murder. That is when Sizemore reconsidered and put his gun down.

As mentioned earlier, in Johnson, the fact that the defendant changes his mind does not give rise to a defense of renunciation, and the Code itself indicates a change of mind after reconsidering the consequences of the defendant's actions, after a substantial step has been taken, is not sufficient to constitute abandonment.

Finally, it would be abhorrent to public policy to allow persons to go around pointing loaded guns at other people, change their minds and be allowed to go off scot-free.

Defense of Intoxication

The defense may also raise the affirmative defense of intoxication. Since Sizemore voluntarily consumed the beers Wendell testified to, his only defense, if at all, would be for voluntary intoxication.

§ 148(a) states that intoxication is not a defense unless it negates an element of the offense.

By § 148(c)(2), self-induced intoxication is defined to mean intoxication caused by substances which the actor knowingly introduces into his body which he knows would cause intoxication.

In State v. Cameron, the court established a two-part test. The first part is that the offense charged must involve a mental element of "knowingly" or "purposely" committing the crime. That part is met here.

The second part of the test is what level of intoxication the defense must show.

Level of Intoxication Defense Must Show

The court identified several factors which could establish a level of intoxication sufficient to justify an acquittal.

(a) Quantity of intoxicant consumed.

The court clearly stated that large quantities of alcohol was not sufficient. The defense had to show such a great prostration of the faculties that the requisite mental state was totally lacking.

Here, we have Wendell's impeached testimony that he and Sizemore consumed three 12-packs, or eighteen cans of beer each.

As we have noted, even if Wendell is to be believed, he also said he consumed about the same amount, yet he did not claim to be incapacitated and claims to have remembered the events that transpired clearly, although Sizemore in his testimony claims not to.

(b) Period of time involved

We have Wendell's testimony that the drinking occurred over a period of six hours.

(c) The actor's conduct as perceived by others

Here, we have Atwood testifying that although he smelled alcohol on Sizemore's breath, he did not appear drunk. He answered all questions intelligently and clearly, never staggered but walked steadily, never wavered while holding the gun, and appeared very much in control.

Further, we have Atwood's uncontradicted testimony about his interview of Sizemore prior to talking to Pam. Sizemore answered him clearly and was even able to lie and suggest Atwood talk to Pam. Later, according to Wendell, he got angry at Pam. All this suggests a man in control of his capacity, able to form coherent thoughts and follow through with conduct, including, as Wendell testified, taking his rifle off its rack and going towards Atwood's car with it.

Further, as alluded to previously, Wendell was able to recall the events of that afternoon and he drank as much as Sizemore, yet Sizemore now claims he was so drunk he could not remember anything.

(d) Results of blood-alcohol test

As there are none here, this is not applicable. All the defense has is a suggestion by Dr. Sharp that Sizemore had more than 0.01 [sic] in his blood. However, Dr. Sharp never examined Sizemore, and no actual tests were administered; therefore, the defense has not established this by any means.

(e) Actor's Ability to recall events

As stated, Sizemore's claim not to remember should be viewed with great skepticism. Wendell was able to recall sufficiently to testify for the defense. He drank as much as Sizemore. Yet Sizemore was unable to recall anything. While different people react to alcohol differently, the evidence suggests, from Atwood's testimony of this conversation and Wendell's of his talk with Sizemore after Atwood went outside, it is clear Sizemore was coherent.

Finally, we would submit Sharp's testimony is irrelevant and probative of nothing. He did not examine Sizemore, we cannot accept his testimony of Sizemore's blood-alcohol content, and everything else follows from that suspect factual basis.

Finally, on policy grounds it would be abhorrent to hold accused persons who, merely by drinking too much, are entitled to be acquitted, for all defendants would then simply get drunk before committing their crimes and be entitled to an acquittal.

Therefore we submit the State has established its case, the defenses are lacking and the Court should convict Sizemore of attempted murder.